

No. 96-8422-CFY

Title: Sillasse Bryan, Petitioner
v.
United States

Docketed:
April 1, 1997

Court: United States Court of Appeals for
the Second Circuit

See also:
97-5386

Entry Date

Proceedings and Orders

Mar 31 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 2, 1997)
Apr 28 1997	Order extending time to file response to petition until June 2, 1997.
May 28 1997	Order further extending time to file response to petition until July 2, 1997.
Jul 2 1997	Brief of respondent United States in opposition filed.
Jul 17 1997	DISTRIBUTED. September 29, 1997
Nov 21 1997	Letter of respondent United States filed.
Nov 26 1997	REDISTRIBUTED. December 12, 1997
Dec 12 1997	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 31, 1998. *****
Jan 20 1998	Motion of petitioner for appointment of counsel filed.
Jan 22 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 23 1998	Joint appendix filed.
Jan 23 1998	Brief of petitioner Sillasse Bryan filed.
Jan 23 1998	Brief amicus curiae of Gun Owners Foundation filed.
Feb 4 1998	DISTRIBUTED. February 20, 1998 (Page 4)
Feb 9 1998	Record filed.
Feb 10 1998	Record filed.
Feb 20 1998	Brief of respondent United States filed.
Feb 23 1998	Motion for appointment of counsel GRANTED and it is ordered that Roger B. Adler, Esquire, of New York, New York, is appointed to serve as counsel for the petitioner in this case. CIRCULATED.
Feb 23 1998	
Mar 18 1998	Reply brief of petitioner Sillasse Bryan filed.
Mar 31 1998	ARGUED.
Apr 6 1998	Letter from counsel for the petitioner received and distributed

ORIGINAL
96-8422

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Supreme Court, U.S.
FILED

MAR 3 1997

OFFICE OF THE CLERK

SILLASSE BRYAN,
Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SILLASSE BRYAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Should this Court resolve a split of decisional authority at the Circuit Court of Appeals level on whether a conviction for violation of 18 USC 922 (a)(1)(A) requires proof that Petitioner was aware of the requirement for, but dispensed firearms without benefit of a federal firearm dealers license?
2. Did trial Judge err in charging jury that it need only find that Petitioner acted "knowingly" and not "willfully" in trafficking in firearms without a federal firearms license by declining to instruct the jury that it must find that Petitioner knew he required a Federal firearms license?
3. Did trial Court's charge to jury err in not instructing jury, as requested, on effect of drug use on witness' credibility?
4. Did trial Court err in charging the jury that it could convict Petitioner of conspiracy for an "overt act" not charged in indictment, or further specified?

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner SILLASSE BRYAN respectfully requests that a writ of certiorari issue to review a judgement of the United States Court for the Eastern District of New York affirming his convictions for conspiracy to distribute firearms without a firearms dealers license (18 U.S.C. 922 (a)(1)(A), 924 (a)(1)(D)) and a substantive count of same, and sentencing him to the custody and control of the Attorney General for a term of 57 months to be followed by a 3-year term of supervised release.

JURISDICTION

The mandate of the United States Court of Appeals was entered on or about March 6, 1997. This petition is timely filed.

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code Section 922 (a)(1)(A) states:

"It shall be unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business or importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce;..."

Title 18 United States Code Section 371 states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under title or imprisoned not more than 5 years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

1. Proceedings in the District Court

Petitioner, SILLASSE BRYAN, of Brooklyn, New York was indicted by an Eastern District of New York Grand Jury for the crimes of conspiracy to distribute firearms without a federal firearms license (18 U.S.C. 371) and with a substantive violation of 18 U.S.C. 922 (a)(1)(A) involving handguns allegedly purchased in Columbus, Ohio by intermediary purchases (so called "Straw Purchasers") 53 year old Delores Marie Tillman and Nicole Bradley.

The firearms in issue were purchased from local gun shops upon presentation by the "straw purchaser" of a valid Ohio drivers license, and payment of the applicable sale price. The state of Ohio does not limit the number of weapons which can be purchased.

Delores Tillman, who testified under a cooperation agreement, acknowledged theft convictions in 1961, and 1989. In 1986 she began trafficking in drugs from her home, "moving" as much as a kilogram of drugs per week. She used drugs herself, including "crack" cocaine, beginning in 1986 for over half a decade. Following her arrest in 1996 for her role in gun trafficking she agreed to cooperate with the Government and entered into a "deferred prosecution" agreement with the Government. Her trial testimony, presumably credited by the jury, established the purchase of .380 Lorcin pistols utilizing a bogus photo identification bearing the name "Delores Kenzer."

The pistols were allegedly given to Petitioner in exchange for "300.00. The pistols were subsequently transported to New York and distributed here.

Nicole Bradley, the final "straw purchaser" purchased pistols utilizing her own name, but admittedly knowingly lied on the pistol purchase application with respect to her self-confessed addiction to drugs.¹ After the weapons were purchased, she gave them to Petitioner in exchange for money.

Ms. Bradley was not formally arrested on a complaint until February 4, 1996 (5 weeks prior to trial). In 1991 she was convicted of forgery. In 1993 she was arrested for theft, and sentenced, in turn, to serve an 18 month jail sentence. She ultimately served 4-6 months in the Court Jail.

Ms. Bradley pleaded guilty, and testified under a "cooperation agreement," to an information charging her with being an unlicensed gun dealer, in the hope of earning a "5-K" substantial assistance letter from the Government.

In addition to the testimony of the two "cooperators" the jury heard testimony that a search of Alcohol Tobacco and Firearms (A.T.F.) revealed Petitioner had no firearms license.

At the conclusion of the Government's case, Petitioner moved pursuant to Rule 29 for a directed verdict. The Petitioner did not testify in his own behalf.

¹ She acknowledged using "crack" cocaine beginning at the end of 1992. She shoplifted and stole to generate cash to support her drug habit.

The sole defense witness was his mother Ernestine Bryan. She testified that Petitioner was learning impaired, and attended local public schools assigned to "Special Education" classes. He was never promoted beyond the 9th grade.

At the conclusion of the entire case, Petitioner unsuccessfully renewed his Rule 29 motion.

THE CHARGE CONFERENCE

Counsel requested that the Court specifically instruct the jury relative to a witness' admitted use of drugs with Siffert & Sand Sec. § 7-9.1 (318).² Counsel likewise requested that the jury be instructed that it must unanimously find an overt act and that at least one overt act be found to have taken place in Brooklyn (Eastern District) (321). The Government disputed that the jury had to find that a charged overt act was committed in Brooklyn (321).

With respect to the issuance of Federal licensing, counsel requested that the Court charge that the Government must prove that the Defendant knew of the license requirement, and engaged in the conduct notwithstanding the need for such a license (323). The Court declined to so charge (323). The Court stated it would charge the jury that with the respect to the overt act requirement, that it would permit the jury to return a conviction under the conspiracy count if it found an "overt act", even one not charged in the indictment (326). Counsel excepted to this determination (327-328).

² Parenthetical references are to the trial transcript.

THE COURT'S CHARGE

The Court instructed the jury on the law, consistent with its indication at the charge conference (329-361). Following the charge as delivered, counsel took proper exception(362).

THE VERDICT

At the conclusion of its deliberations, the jury returned a guilty verdict on both counts. The jury advised the Court that it found an overt act to have occurred within the Eastern District (379).

POST-VERDICT MOTION

Appellant moved, pursuant to Rule 33, to set aside the jury's verdict. Counsel contended that the Court's charge was legally erroneous because it failed to require the Government to prove that Defendant must have known of his need to possess a Federal Firearms Dealers License, and that with respect to venue, that the Court's charge permitted a finding of an Eastern District conspiracy, even if it found the commission of an overt act other than overt act #3. The Court denied the motion.

THE SENTENCE

On June 3, 1996, the Court sentenced BRYAN to serve 57 months imprisonment under the custody of the Attorney General. A timely Notice of Appeal was filed.

THE APPEAL

Petitioner appealed to the Court of Appeals for the Second Circuit. In a February 10, 1996 unreported opinion, which reflected acknowledgement of circuit conflict (see A-2), the Court unanimously affirmed Petitioner's conviction, but acknowledged being bound by prior prevailing circuit case law. The mandate of the Court was filed on March 3, 1997.

REASONS FOR GRANTING THE WRIT

A. THE WILLFULNESS REQUIREMENT

The petition for certiorari should be granted because the decision of the Second Circuit is squarely in conflict with the well-reasoned holdings by sister circuit courts in United States v. Sanchez-Corcino, 85 F.3d 549, 552-554 [11th Cir. 1996]; United States v. Obiechie, 38 F.3d 309, 315-316 [7th Cir. 1994]; United States v. Hayden, 64 F.3d 126, 130 [3rd Cir. 1995].

The Second Circuit, however, adheres to the views set forth in United States v. Collins, 957 F.2d 72, 76 [2nd Cir.] cert. den. 504 U.S. 944 [1992] accord. United States v. Ali, 68 F.3d 1468 [2nd Cir. 1995].

The presence and proof of "mens rea" (vicious will or intent), this Court has held, has been the hallmark of criminal felony level prosecutions (Morissette v. United

States, 342 U.S. 246, 251 72 S.Ct. 240, 96 L.Ed. 288, 294 [1952]; Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, L.Ed.2d 228 [1957]) (prior felon's failure to register if remaining in Los Angeles, California for more than five days invalid, since Defendant probably did not know of registration requirement); LiParota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 [1985]) (conviction of co-owner of Chicago, Illinois sandwich shop for unlawful possession of food stamps reversed, since although Moon's Sandwich Shop was not authorized by Dept. of Agriculture to accept food stamps, absent proof of said knowledge conviction cannot stand).

More recently, in Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793 [1994], this Court held that the Government was required to prove that in the context of prosecution for unlawful possession of unregistered "firearm" (including machine gun), Defendant knew features and characteristics that make weapon a "firearm" under 26 USC § 5861 (see also United States v. Edwards, 90 F.3d 199, 204 [7th Cir. 1996]; accord Ratzlaff v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 [1994] rev'g 976 F.2d 1280 [9th Cir.], wherein prosecution for "structuring" cash currency transactions reversed, absent proof Defendant knew that his conduct violated law which requires that Defendant acted "willfully;" United States v. Curran, 20 F.3d 560, 570 [3rd Cir. 1994]).

Finally, we note parenthetically, that there are currently pending petitions for a Writ of Certiorari in Clement v. United States,³ __U.S.__, 60 Cr. L. Rptr. 3172

³ A review of the petition filed in Clement reveals that no objection was taken to Judge Johnson's charge. Accordingly, the issue is reviewable only if cognizable as "plain error."

[Docket # 96-1080] which addresses Section § 922 (a)(5) of Title 18 and Rogers v. United States, __U.S.__, 60 Cr. L. Rpts. 3206 [Docket # 96-1279] involving Court's failure to charge on jury's need to find Defendant knew unregistered and unserialized silencer constituted "firearm" under National Firearms Act (26 U.S.C. 5801-5972). At a time when there is heightened attention to gun trafficking, the need to resolve this conflict is important. In a mobile society, a defendant engaged in conduct in the 3rd, 7th, or 11th Circuit, obtains the benefit of a finding of licensing. Should his case, however, be brought in New York, he will find himself confronted by a United States Attorney who need not prove such knowledge. An issue of this significance ought not turn on which portion of the inter-state national highway system the conduct occurs. The need for national uniformity on this issue is important to gun enthusiasts, law enforcement, and the citizenry as well.

B. THE OVERT ACT REQUIREMENT

With the exception of conspiracies to violate the drug laws (see e.g., United States v. Shabani, __U.S.__, 115 S.Ct. 382, 130 L.Ed.2d 255 [1994]) conspiracy prosecutions require both the pleading and proof in the course and furtherance of the conspiracy charged.

In the case at bar, the Court instructed the jury that while it must find at least one overt act, the jury was instructed that in finding an overt act, it was not limited to the overt acts which the Grand Jury voted, and were charged in the indictment.

The effect of this instruction was to permit the jury to find the existence of a conspiracy based upon conduct which might not even constitute an "overt act" or one which was committed in furtherance of the conspiracy or which was not found to be one by the Grand Jury (United States v. Sacco, 436 F.2d 780, 783 [2nd Cir. 1971]).

The legal impact of the finding of an overt act is of great significance. A conspiracy without the commission of an overt act in the furtherance of the conspiracy charged must be found or there can be no conspiracy (United States v. Rabinowich, 238 U.S. 78, 35 S.Ct.682 [1915]; Grunewald v. United States, 353 U.S. 391 77 S.Ct. 963 [1957]; United States v. Grossman, 55 F.2d 408 [1931]). The overt act thus must be one charged, and found to have been committed in the furtherance of the conspiracy (United States v. Sacco, 436 F.2d 780, 783 [2nd Cir. 1971] but C.F. United States v. Lewis, 759 F.2d 1316, 1344 [8th Cir. 1985]; "Modern Federal Jury Instructions," Section § 19-7 [Sand & Siffert]).

The implications of such an expansive instruction⁴ in one fell swoop enlarged the law of conspiracy beyond the wildest dreams of prosecutors (and nightmares of defense counsel), and deprived Defendant of a fair trial.

In denying relief, the Court relied upon its prior holding in United States v. Armone, 363 f.2d 385, 400 [2nd Cir. 1966], an opinion by former Chief Judge Feinberg, involving a prosecution for narcotics law violations. Since such prosecutions

⁴ Since proper requests and exceptions were lodged, application of the "Plain Error" rule does not apply (C.F. United States v. Olano, 507 U.S. 725, 730-732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 [1993]).

do not require overt acts, the case is clearly distinguishable, but c.f. Yates v. United States, 354 U.S. 298, 334 77 S.Ct. 1064, 1085 [1957].

C. THE FAILURE TO INSTRUCT ON WITNESS' DRUG USE

The instant prosecution was built upon an evidentiary foundation of two self-confessed accomplices, Columbus, Ohio natives NICOLE BRADLEY and DELORAS TILLMAN. Both women, substantially older than the teen-aged SILLASSE BRYAN, acknowledge entering a number of Columbus, Ohio licensed gun retailers, to purchase pistols for cash. Both women acknowledge making multiple false statements upon pistol purchase applications and thereby intentionally misleading the vendors as to their legal eligibility to purchase guns. Moreover, each was substantially immersed in drug use and/or drug trafficking involvement which was overlooked by the Government in exchange for their testimonial cooperation.

Against the aforementioned backdrop, defense counsel submitted request to charge which, if incorporated in the Court's charge, would have alerted the fact-finders to the effect that their drug use and interest in the outcome of the case against Appellant should be viewed. Although JUDGE TRAGER gave general instructions relative to the determination of witness credibility (see T-0337-342). However, the Court's failure to include a specific instruction that Ms. BRADLEY and Ms. TILLMAN were interested witnesses as a matter of law, and that witness' drug use required particular juror scrutiny, undercut the credibility weighing tools

desperately needed by the jurors to arrive at a proper verdict (see "Modern Federal Instructions," Section § 7-9.1 (Sand & Siffert); United States v. Pagano, 207 F.2d 884, 885 [2nd Cir. 1953]; c.f. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 198 [1917]).

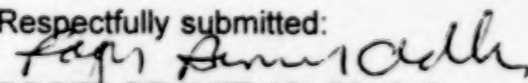
This Court should grant this petition to provide definitive guidance to the Trial Courts of this nation in this most important area. Clearly generalized credibility instructions are insufficient to provide proper guidance to lay jurors.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
March 27, 1997

Respectfully submitted:


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New York, New York 10007
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ROGER BENNET ADLER
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY-bkny
95-cr-765
Trager

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of February one thousand nine hundred and ninety-seven.

PRESENT: Honorable John M. Walker, Jr.,
Honorable Fred I. Parker,
Honorable Gerald W. Heaney,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-- v. --

SILLASSE BRYAN, aka "Uzi,"

Defendant-Appellant.

APPEARING FOR DEFENDANT-APPELLANT:

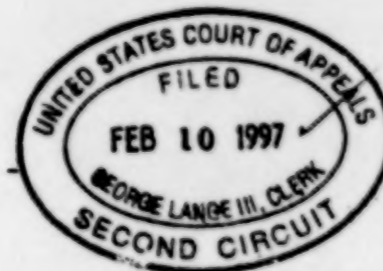
Roger Bennet Adler, New
York, New York.

APPEARING FOR APPELLEES:

Elaine D. Banar,
Assistant United States
Attorney, Eastern
District of New York,
Brooklyn, New York.

Appeal from an order of the United States District
Court for the Eastern District of New York.

Hon. Gerald W. Heaney of the United States Court of
Appeals for the Eighth Circuit sitting by designation.



96-1450

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York (David G. Trager, Judge) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the United States District Court for the Eastern District of New York is **AFFIRMED**.

Sillasse Bryan appeals from a judgment of conviction of the United States District Court for the Eastern District of New York. Bryan was convicted on July 3, 1996, after a jury trial, of conspiring to engage in the sale of firearms without a license as well as actually engaging in the sale of firearms without a license in violation of 18 U.S.C. §§ 371, 922(a)(1)(A). Judge Trager sentenced Bryan to a term of 57 months in prison and to supervision upon release for three years.

Bryan seeks reversal of his conviction on three grounds: first, that jury had before it insufficient evidence upon which to convict him of the violations charged; second, that the court erred in failing to charge the jury properly with respect to the credibility of certain witnesses for the government; and, third, that the court erred in instructing the jury that an overt act not set forth in the indictment may constitute an act in furtherance of a conspiracy under 18 U.S.C. § 371. Each of these claims is without merit.

Bryan's first contention is that the jury had insufficient evidence on which to convict him of the willfulness necessary under 18 U.S.C. § 921(a)(1). Defendant's argument, however, rests on a misunderstanding of the law of this circuit. The willfulness element of unlawful sale of firearms does not require proof "that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute." See United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995). Rather, this circuit reads the willfulness requirement more "broadly requir[ing] only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." United States v. Collins, 957 F.2d 72, 76 (2d Cir. 1992). Thus, while we acknowledge that several of our sister circuits have construed the law more narrowly, see, e.g., United States v. Sanchez-Corcino, 85 F.3d 549, 553 (11th Cir. 1996) (holding that "in order for the Government to prove the offence of willfully dealing in firearms without a license . . . it must prove that the defendant acted with knowledge of the licensing requirement"), defendant's argument for such a construction of the law in this circuit is foreclosed.

With the proper understanding of the requirement of willfulness in this circuit, defendant's insufficiency argument is unavailing. It is axiomatic that a defendant faces a heavy

burden when challenging the sufficiency of the evidence to support a jury's verdict. See United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983). In passing on such a challenge, the court views the evidence in the light most favorable to the government. Jackson v. Virginia, 443 U.S. 307, 319 (1979). At trial, the government elicited ample proof that defendant's conduct "was knowing and purposeful" and that he "intended to commit an act which the law forbids." United States v. Collins, 957 F.2d at 76. In brief, the government established that Bryan made several trips from his home in New York City to Ohio for the purpose of purchasing firearms that he was unable to obtain legally in New York; that he enlisted the aid of two Ohio women to purchase the firearms on his behalf, knowing that in Ohio purchase was possible with an in-state driver's license alone; that he provided the women the funds to purchase the guns and accompanied them to the dealer; that Bryan confessed to purchasing firearms in Ohio with the intention of transporting them to New York for resale; and, most important, that defendant removed the serial numbers of the firearms purchased to avoid detection. Viewed in the light most favorable to the government, this evidence is sufficient to establish that Bryan knowingly intended to commit an act which the law forbids. Id.

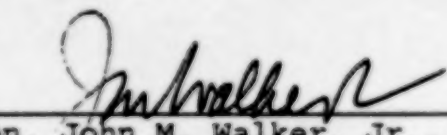
Defendant's second argument on appeal concerns the court's instructions regarding the credibility of two of the government's witnesses, women who aided Bryan in purchasing firearms during his trips to Ohio. As an initial matter, we note that defendant's counsel failed to object to the credibility charge given by the district court. Joint Appendix 128-29. Thus, notwithstanding the inclusion of the sought after charge in defendant's proposed instruction submitted to the court, we review for plain error. See United States v. Locascio, 6 F.3d 924, 942 (2d Cir. 1993). Accordingly, we will reverse only "in those circumstances in which a miscarriage of justice would otherwise result." Id. at 942 (quotations omitted). Here no such error occurred. Defendant sought an instruction (1) that would have specifically informed the jury that both the witnesses were drug abusers and that they were abusing drugs at the time certain events at issue allegedly occurred and (2) that the witnesses were interested in the outcome of the trial. See Defendant-Appellant's Brief at 24-25.

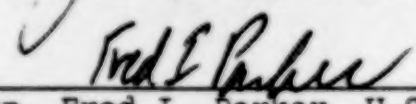
As to the proposed drug abuse charge, the district court did not err in refusing to accept it as there was contradictory evidence on the matter with respect to one of the witnesses at issue. See United States v. Lam Lek Chong, 544 F.2d 58, 68 (2d Cir. 1976) (finding that a requested charge "must be accurate in every respect before a trial judge is held in error for refusing it") (quotations omitted), cert. denied, 429 U.S. 1101 (1977). Even were this not the case, we cannot conclude that the district court's refusal of this instruction was plain error. As to the credibility instruction, the district court

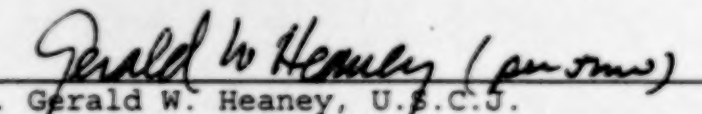
took care to instruct the jury of the dangers inherent in accomplice testimony and of the need to give the two witnesses' testimony special attention because both had entered into cooperation agreements with the government. Thus, defendant's argument in this regard is meritless.

Finally, defendant argues that the district court erred in charging the jury that an overt act not included in the indictment can constitute the foundation of a conspiracy conviction. Defendant's argument fails. The court has specifically held that a conspiracy "conviction may rest on an overt act not charged in the indictment." United States v. Armone, 363 F.2d 385, 400 (2d Cir. 1966) (Feinberg, C.J.).

For the foregoing reasons, we find defendant's arguments to be without merit. Accordingly, we affirm the judgment of the district court.


Hon. John M. Walker, Jr., U.S.C.J.

 (per curiam)
Hon. Fred I. Parker, U.S.C.J.

 (per curiam)
Hon. Gerald W. Heaney, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY-bkny
95-cr-765
Trager

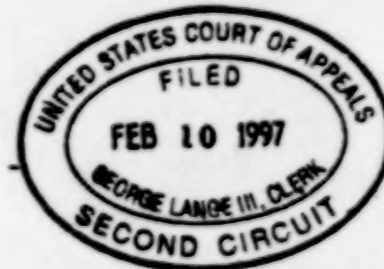
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of February one thousand nine hundred and ninety-seven.

PRESENT: Honorable John M. Walker, Jr.,
Honorable Fred I. Parker,
Honorable Gerald W. Heaney,

Circuit Judges.



96-1450

UNITED STATES OF AMERICA,

Appellee,

-- v. --

SILLASSE BRYAN, aka "Uzi,"

Defendant-Appellant.

APPEARING FOR DEFENDANT-APPELLANT:

Roger Bennet Adler, New
York, New York.

APPEARING FOR APPELLEES:

Elaine D. Banar,
Assistant United States
Attorney, Eastern
District of New York,
Brooklyn, New York.

Appeal from an order of the United States District
Court for the Eastern District of New York.

Hon. Gerald W. Heaney of the United States Court of
Appeals for the Eighth Circuit sitting by designation.

ISSUED AS MANDATE. 3/3/97

96-8422

SUPREME COURT OF THE UNITED STATES

SILLASSE BRYAN,
Petitioner,

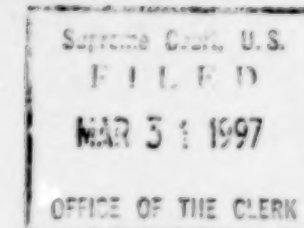
-against-

AFFIDAVIT OF SERVICE

Docket No.: 96-

UNITED STATES OF AMERICA,
Appellee,

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)



ROGER BENNET ADLER, being duly sworn, deposes and says:

I am a member of the bar of this Court, not a party to the within action, am
over eighteen years of age and reside in Brooklyn, New York.

On the 26th day of March, 1997, I served the within Writ of Certiorari for
defendant, Sillasse Bryan, on:

Asst. U.S. Atty Elaine Banar
c/o United States Attorney's Office
225 Cadman Plaza East
Brooklyn, New York 11201

Office of The Solicitor General
c/o Department of Justice
Constitution Avenue & 10th Street, N.W.
Washington, D.C. 20530

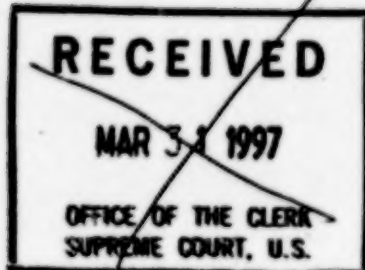
by depositing a true copy of same enclosed in a pre-paid properly addressed first
class envelope wrapper, in an official depository under the exclusive care and
custody of the United States Postal Service within the State of New York.

Roger Bennet Adler
ROGER BENNET ADLER

Sworn to before me this
27th day of March, 1997

Marilyn Maras
NOTARY PUBLIC

MARILYN MARAS
COMMISSIONER OF DEEDS
OF NEW YORK 64-0133
ATE FILED IN NEW YORK COUNTY
COMMISSION EXPIRES OCTOBER 3, 1998



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

96-96-8422

SILLASSE BRYAN,

Petitioner,

v.

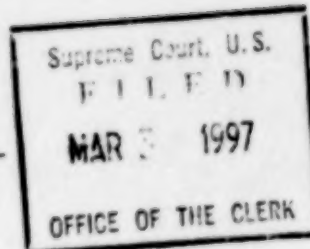
UNITED STATES OF AMERICA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
AND FOR ASSIGNMENT OF COUNSEL

ROGER BENNET ADLER, P.C.
225 Broadway - Suite 1804
New York, New York 10007
(212) 406-0181

Attorney for Petitioner
SILLASSE BRYAN



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
AND FOR ASSIGNMENT OF COUNSEL

Petitioner, SILLASSE BRYAN, respectfully requests this Honorable Court to grant leave to continue his counsel appointed pursuant to the Criminal Justice Act, and waive the Court's regular filing fees.

FACTUAL BACKGROUND

Petitioner was charged pursuant to indictment number 95 Cr. 765 (S-1) (DGT) with a violation of 18 U.S.C. 371 and 922 (a)(1)(A) and has been continuously represented by Court appointed counsel pursuant to the terms of Criminal Justice Act since his initial appearance in the United States District Court for the Eastern District

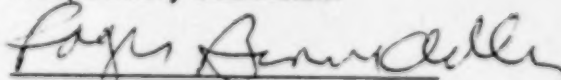
of New York. By order of Judge David G. Trager dated August 14, 1995, ROGER BENNET ADLER was assigned as counsel to represent petitioner.

Mr. Adler's appointment was later continued by the United States Court of Appeals for the Second Circuit. During the course of perfecting the direct appeal (Docket #96-1450, Petitioner has been under the custody of the Federal Bureau of Prisons, and currently remains incarcerated at Allenwood Prison Camp in the State of Pennsylvania. Upon information and belief, he has not received any income from any source since the initial appointment of counsel back in 1995.

WHEREFORE, the Petitioner respectfully prays that the motion at bar be GRANTED, Petitioner permitted to proceed in forma pauperis with all filing fees and regular certiorari petition printing requirements waived, and ROGER BENNET ADLER, a member of this Court, having been admitted to practice on December 9, 1974, continued as Court appointed counsel under the terms and conditions of the Criminal Justice Act.

Dated: New York, New York
March 27, 1997

Respectfully submitted:



ROGER BENNET ADLER, P.C.

Attorney for Petitioner

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AB
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ORIGINAL

No. 96-8422

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U.S. SUPREME COURT
FILED

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SILLASSE BRYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether a conviction under 18 U.S.C. 924(a)(1)(D) for willfully violating 18 U.S.C. 922(a)(1)(A), which prohibits dealing in firearms without a federal license, requires the jury to find that the offender knew of the federal licensing requirement and nonetheless sold firearms without a license.
2. Whether the district court erred when it refused to give petitioner's proposed jury charges on the credibility of accomplice-witnesses.
3. Whether the district court erred by charging the jury that it could convict petitioner of conspiracy if the jury unanimously found an overt act other than the acts charged in the indictment.

(I)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-8422

SILLASSE BRYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1997. Pet. App. A1. The petition for a writ of certiorari was filed on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to deal in firearms without a license, in

violation of 18 U.S.C. 371, and one count of unlawful dealing in firearms without a license, in violation of 18 U.S.C.

922(a)(1)(A) and 924(a)(1)(D). He was sentenced to 57 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A4.

1. Between December 1992 and August 1993, petitioner, with the aid of two accomplices, purchased 14 firearms in gun stores in Columbus, Ohio, and then resold them in Brooklyn, New York, without having the required federal license for firearms dealers. Gov't C.A. Br. 2. Petitioner admitted to one of his accomplices that he could not buy guns in New York, where he lived, because he did not have a license. Ibid.; Tr. 30. Petitioner assured the other accomplice that she would not get into trouble for assisting petitioner in purchasing the firearms because he intended to make the guns untraceable by removing the serial numbers. Gov't C.A. Br. 3. Petitioner confessed, after his arrest, that he used accomplices in Ohio to purchase the firearms there, that he and his accomplices transported the guns to New York, and that he sold the guns for \$500 each in his Brooklyn neighborhood. Ibid. Records from the Department of the Treasury confirmed that petitioner never possessed a federal license to deal in firearms. Id. at 4.

2. Petitioner was charged with violating 18 U.S.C. 922(a)(1)(A), which prohibits anyone other than a licensed dealer from dealing in firearms. Under 18 U.S.C. 924(a)(1)(D), anyone who "willfully" violates Section 922(a)(1)(A) (among other

provisions) is subject to a fine and imprisonment.

Petitioner requested the trial court to instruct the jury that, to find petitioner guilty, it was required to find that he knew of the license requirement and engaged in his conduct notwithstanding the known need for such a license. Pet. 5. The trial court refused to give that instruction. Instead, the trial court defined the term "willfully" for the jury as follows:

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

Tr. 345. Further, with specific regard to the offense of unlawful dealing in firearms without a license, the trial court instructed:

In this case, the government is not required to prove that [petitioner] knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that [petitioner] acted willfully. In order to satisfy this element, the government must prove that [petitioner] acted knowingly and purposely and that [petitioner] intended to commit an act which the law forbids.

Tr. 350.

Petitioner also requested the court to charge the jury that his accomplices (who testified at trial) were drug abusers and were interested in the outcome of the trial. The court declined to give that instruction. The court did instruct the jury, however, that, "[b]ecause of the very nature of accomplice testimony, * * * it must be scrutinized with great care and viewed with particular caution when you decide how much of that

testimony to believe. You should, for example, ask yourselves whether an accomplice witness would benefit more by lying or by telling the truth." Tr. 341. It further charged that the jury should consider the effect of the accomplices' plea agreements with the government on their credibility. Tr. 341-342.

With respect to the conspiracy charge, the court instructed the jury that the government was required to prove that "at least one overt act was knowingly committed by one of the conspirators at or about the time and place alleged. This overt act need not be one of the four charged in the indictment. But, you all must agree on at least one overt act." Tr. 356-357.

3. In an unpublished summary disposition, the court of appeals affirmed petitioner's convictions. The court first rejected petitioner's contention that the evidence was insufficient to support his conviction for willful dealing in firearms without a license. That argument, stated the court,

rests on a misunderstanding of the law of this circuit. The willfulness element of unlawful sale of firearms does not require proof "that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute." See United States v. Ali, 68 F.3d 1468, 1473 (2d Cir. 1995). Rather, this circuit reads the willfulness requirement more "broadly requir[ing] only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." United States v. Collins, 957 F.2d 72, 76 (2d Cir. 1992). Thus, while we acknowledge that several of our circuits have construed the law more narrowly, see, e.g., United States v. Sanchez-Corcino, 85 F.3d 549, 553 (11th Cir. 1996) (holding that "in order for the Government to prove the offense of willfully dealing in firearms without a license . . . it must prove that the defendant acted with knowledge of the licensing requirement"), [petitioner's] argument for such a

construction of the law of this circuit is foreclosed.¹

Pet. App. A2. Applying that standard, the court found the evidence sufficient to support the conviction. The court noted that petitioner had made several trips to Ohio for the purpose of purchasing guns that he could not obtain legally in New York; that petitioner enlisted two Ohio women to help him purchase guns there, knowing that in Ohio an in-state driver's license was sufficient for a gun purchase; that petitioner confessed to purchasing the guns in Ohio with the intention to transport them to New York; and that petitioner removed the serial numbers from the firearms in order to avoid detection. Pet. App. A3.

Petitioner also challenged the trial court's refusal to give his proposed accomplice-witness instruction as well as the credibility instruction actually given by the court. The court of appeals reviewed his challenge only for plain error, noting

¹ In United States v. Collins, 957 F.2d 72, cert. denied, 504 U.S. 944 (1992), the Second Circuit rejected the defendant's contention that the element of willfulness in cases like this one requires proof that the defendant knew specifically of the federal licensing requirement and intended to disobey that requirement. See id. at 76. Instead, the Collins court held, the element of willfulness requires "only that the government prove that the defendant's conduct was knowing and that the defendant intended to commit an act which the law forbids." Ibid. The court of appeals then held that the district court's failure to instruct on willfulness in that case was harmless error because, inter alia, "evidence that Collins repeatedly obliterated serial numbers from the guns he sold and wiped fingerprints off guns when he sold them, demonstrates that Collins understood that his firearms sales violated the law." Id. at 77. In United States v. Ali, 68 F.3d 1468, 1472 (1995), the Second Circuit held that the government "need not establish that the defendant had specific knowledge of the statute he is accused of violating, nor that he had the specific intent to violate the statute."

that petitioner had not objected to the credibility charge given by the district court. Pet. App. A3. The court found no error, for it concluded that the charge proposed by petitioner was not accurate; that proposed charge asserted that both accomplice witnesses were abusing drugs during the critical time period, but "there was contradictory evidence on the matter with respect to one of the witnesses at issue." Ibid. The court of appeals also observed that "the district court took care to instruct the jury of the dangers inherent in accomplice testimony and of the need to give the two witnesses' testimony special attention because both had entered into cooperation agreements with the government." Id. at A3-A4.

Finally, the court found no error in the trial court's charge that the jury could find petitioner guilty of conspiracy if it unanimously found that one of the conspirators had committed an overt act in furtherance of the conspiracy, even if that overt act was not one of the acts pleaded in the indictment. Pet. App. A4. Relying on circuit precedent, the court held that "a conspiracy conviction may rest on an overt act not charged in the indictment." Ibid.

DISCUSSION

1. Petitioner contends (Pet. 7-9) that the jury was improperly instructed on the standard for establishing a willful violation of the firearms licensing provision at issue in this case, 18 U.S.C. 922(a)(1)(A), and that the circuits are divided on the proper construction of the element of willfulness set

forth in 18 U.S.C. 924(a)(1)(D). Petitioner argues that the trial court should have charged the jury that, to find petitioner guilty, it was required to find that he was aware of the requirement of a federal firearms dealer's license but nonetheless dispensed firearms without a license. In our view, the instructions in this case adequately conveyed to the jury the correct requirements for establishing willfulness under Section 924(a)(1)(D). We agree with petitioner, however, that the courts of appeals are divided as to the construction of the element of willfulness in cases like this one. Because the question is important to the administration of federal firearms regulation, this Court's review is warranted.

a. Section 922(a)(1)(A) prohibits anyone other than a federally licensed firearms dealer from dealing in firearms. The element of scienter for a criminal violation of that provision is supplied by 18 U.S.C. 924(a)(1), which punishes, and sets out penalties for, a variety of firearms offenses. Section 924(a)(1) provides, in pertinent part:

Except as otherwise provided * * * , whoever

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearms or ammunition in violation of section 922(1); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(Emphasis added.) Petitioner's offense falls under Section 924(a)(1)(D). Accordingly, the government was required to prove beyond a reasonable doubt that petitioner acted "willfully."

The proper interpretation of the willfulness requirement in Section 924(a)(1)(D) should be informed by three principles of statutory construction. First, the word "willfully" is a "word of many meanings, its construction often being influenced by its context." Spies v. United States, 317 U.S. 492, 497 (1943).

Thus, to determine the precise mental state under the willfulness requirement here, it is necessary to examine the statutory context surrounding Section 924(a)(1)(D). Second, because Congress provided that certain firearms offenses warrant criminal punishment if committed "knowingly" but specified that other offenses may be punished only if committed "willfully," there is a presumption that Congress intended the concept of willfulness to require a different showing than that of mere knowledge. See Russello v. United States, 464 U.S. 16, 23 (1983). Third, there is a "venerable principle that ignorance of the law generally is no defense to a criminal charge," which is overcome only in special circumstances. Ratzlaf v. United States, 510 U.S. 135, 149 (1994); Cheek v. United States, 498 U.S. 192, 199 (1991).

Against that background, an examination of the statutory context indicates that a "willful[]" violation under Section

924(a)(1)(D) requires proof that the defendant was generally aware or believed that his conduct was illegal and engaged in it despite that awareness or belief, but does not require proof that the defendant knew of any particular statutory requirement or knew that his conduct violated that law. That construction supplies the words "willfully violated" with a meaning different from that of mere knowledge and protects a defendant from conviction based on an inadvertent violation of the law, but does not require the government to make the unusual and heightened mens rea showing that the defendant had specific knowledge of provisions of federal law.

At the outset, it is established that, to show that the defendant acted "knowingly" under Section 924(a), the government is not required to show that the defendant knew his conduct was unlawful, but must show only that the defendant knew he was engaging in the prohibited conduct. See United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988) ("Congress chose the word 'knowingly' precisely because it did not want knowledge of the law to be an element of the offenses."); see also United States v. Langley, 62 F.3d 602 (4th Cir. 1995) (en banc), cert. denied, 116 S. Ct. 797 (1996); United States v. Elias, 937 F.2d 1514, 1518 (10th Cir. 1991); United States v. Dancy, 861 F.2d 77, 80-82 (5th Cir. 1988). That conclusion is appropriate in light of the inherently serious nature of the violations covered by the "knowingly" requirement, such as making false statements (Section 924(a)(1)(A)); possessing dangerous devices such as

machine guns and semiautomatic assault weapons, or transporting firearms with obliterated serial numbers (Section 924(a)(1)(B)); or importing firearms or ammunition (Section 924(a)(1)(C)). Given that construction of "knowingly," it is reasonable to conclude that the element of willfulness under Section 924(a)(1)(D) requires something more than the defendant's knowledge of his actions.

Such an inference is confirmed by the nature of the offenses covered by Section 924(a)(1)(D) (including the one in this case). The covered offenses involve, for example, the unlicensed manufacture, transportation, and dealing of firearms. Those offenses are not necessarily mala in se; rather, they generally concern matters that have been brought within the criminal law to enforce a federal regulatory scheme. While the offenses covered by "knowingly" and "willfully" in Section 924(a) may not divide into two different categories with complete clarity, it is nonetheless reasonable to infer that Congress imposed a willfulness requirement under Section 924(a)(1)(D) to protect against criminal punishment for inadvertent violations of regulatory provisions, while imposing a mere knowledge requirement for more self-evidently serious violations.

Nonetheless, there is nothing in the context or structure of Section 924(a) that suggests that Congress intended to impose on prosecutions under Section 924(a)(1)(D) the highest scienter requirement known to the criminal law -- specific knowledge of the particular legal requirements violated. Such a heightened

requirement would unnecessarily depart from the settled maxim that ignorance of the law is not a defense. Cheek, 498 U.S. at 199. Rather, to show a willful violation in cases like this one, it is sufficient that the government prove that the defendant was aware or believed that his conduct was illegal and acted with a purpose to violate the law, even if he lacked knowledge of the particular requirements of the law that he was violating.

The jury instructions in this case adequately expressed that understanding of willfulness.² "[C]onsidered in the context of the instructions as a whole and the trial record," Estelle v. McGuire, 502 U.S. 62, 72 (1991) (internal quotation marks omitted); United States v. Pipola, 83 F.2d 556, 563 (2d Cir. 1996), the jury instructions explained that a conviction under Section 924(a)(1)(D) required proof that petitioner acted with a purpose to violate the law, but that it was unnecessary for the jury to find that he knew the specific requirements of the federal licensing regime that he had violated. In general instructions, the trial court defined "willfully" to the jury as requiring "the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law." See Tr. 345. At the same time, the court made clear that actual knowledge of any particular legal requirement was not a prerequisite for conviction. Ibid. In further charging the jury on the particular offense in this case, the court, after

² The relevant jury instructions on willfulness are set forth in an appendix to this brief. See App., infra.

explaining that knowledge of illegality was not required, again defined "willfully," stating that to satisfy that element, the government was required to prove that petitioner "acted knowingly and purposely and * * * intended to commit an act which the law forbids." Tr. 350. Although the last clause is somewhat ambiguous, the instructions as a whole fairly communicated that the jury was required to find not just that petitioner knowingly committed the acts that amount to a violation of the law, but also that he committed them with a purpose to violate the law.

The evidence in this case was sufficient to meet that standard. The court of appeals, after reviewing the evidence, noted that petitioner engaged in conduct that demonstrated his awareness of the illegality of his actions -- such as his traveling to Ohio for the purpose of obtaining firearms that he could not obtain legally in New York, his use of accomplices residing in Ohio to buy firearms there, and "most important," his removal of the serial numbers of the firearms that he purchased in Ohio. Pet. App. A3. That evidence sufficed to establish that petitioner was at least generally aware that his conduct was illegal, and purposely engaged in such conduct.

b. Although the instructions in this case were sufficient to communicate a correct understanding of willfulness, we agree with petitioner that the courts of appeals are divided on the proper interpretation of willfulness under Section 924(a)(1)(D). The Eleventh Circuit in United States v. Sanchez-Corcino, 85 F.3d 549, 553 (11th Cir. 1996), has held that it is necessary for the

government to prove that the defendant "acted with knowledge of the licensing requirement." The court specifically stated that "[k]nowledge of the general illegality of one's conduct is not the same as knowledge that one is violating a specific rule -- here, the prohibition against unlicensed dealing in firearms." Id. at 554. Furthermore, as the court of appeals in this case recognized (Pet. App. A2), the instruction given here would have been found insufficient by the Eleventh Circuit under Sanchez-Corcino. See 85 F.3d at 554 (finding jury instruction insufficient when it permitted conviction without the jury "ever having concluded that [the defendant] knew of the licensing requirement"). Two other courts of appeals have also required the government to establish that the defendant knew that his conduct was unlawful to satisfy the willfulness requirement under Section 924(a)(1)(D). United States v. Hayden, 64 F.3d 126, 130 (3d Cir. 1995); United States v. Obiechie, 38 F.3d 309, 315 (7th Cir. 1994); see also United States v. Hern, 926 F.2d 764, 767 & n.6 (8th Cir. 1991). Although those courts have been less specific than the Eleventh Circuit in articulating the proper jury instruction to explain the concept of willfulness to the jury, they, along with the Eleventh Circuit, have expressly disagreed with the governing Second Circuit precedent applied by the court of appeals in this case, United States v. Collins, 957 F.2d 72, cert. denied, 504 U.S. 944 (1992). See Pet. App. A2 (relying on Collins); cf. Sanchez-Corcino, 85 F.3d at 553 n.1 (disagreeing with Collins); Hayden, 64 F.3d at 130 n.6 (same);

Obiechie, 38 F.3d at 315 (same).

The conflict on the element of willfulness at issue in this case warrants resolution by this Court. Prosecutions for unlicensed dealing in firearms arise with some regularity, and the proper definition of the scienter standard is often an important issue. While in some cases it may be possible for the government to satisfy the stringent scienter requirements imposed by the Eleventh Circuit (and possibly by the Third and Seventh Circuits as well), in other cases, proving specific knowledge of federal licensing requirements is quite difficult. Clandestine firearms dealers may not acquaint themselves with the specific requirements of federal law that they are violating, or even know whether it is federal, state, or local law they are violating, yet such dealers may purposefully act with awareness that their surreptitious sales are unlawful. Application of Section 924(a)(1)(D) in such circumstances is hampered if the government must shoulder the burden of showing specific knowledge of the requirements of the United States Code as a prerequisite to conviction. Alternatively, if such a showing is required by federal law, there is no reason why defendants in the Second Circuit should be convicted without it. Accordingly, review by this Court is warranted.

2. Petitioner also argues (Pet. 11-12) that the trial court erred when it refused to instruct the jury that his accomplices' credibility warranted particularly careful scrutiny by the jurors because they used drugs, and that the accomplices

were interested witnesses as a matter of law. Those contentions are without merit. As the court of appeals noted, the proposed drug-abuse instruction was properly rejected because the instruction was not accurate; there was contradictory evidence about the drug use of at least one of the accomplices. Pet. App. A3; see United States v. Lam Lek Chong, 544 F.2d 58, 68 (2d Cir. 1976) (noting that a requested instruction "must be accurate in every respect before a trial judge is held in error for refusing it"), cert. denied, 429 U.S. 1101 (1977).

As for the requested instruction on the accomplices' interest in the outcome of the case, "no absolute and mandatory duty is imposed upon the trial court to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution." United States v. Schoenfeld, 867 F.2d 1059, 1062 (8th Cir. 1989) (per curiam). Moreover, the court charged the jury to evaluate the accomplices' testimony with care. See pp. 3-4, supra; Tr. 341. And after describing the cooperation agreements between the accomplices and the government, the court also instructed that "witnesses who testify pursuant to such agreements have an interest in this case different from an ordinary witness. This is why you must carefully scrutinize whether the testimony of such a witness was made up in any way because the witness believed or hoped that he or she would receive favorable treatment by testifying falsely." Tr. 342. Those instructions alerted the jury that it should evaluate the accomplices' testimony very carefully and should

assess all of the possible reasons why that testimony might be more or less reliable.

3. Finally, petitioner argues (Pet. 9-11) that the trial court erred in instructing the jury that the overt-act requirement for the conspiracy charge could be met if the jury unanimously agreed that one of the conspirators committed an overt act in furtherance of and during the conspiracy, even if that act was not one of the overt acts alleged in the indictment. There was no error in that charge. It is well established that, "in conspiracy cases, the government is not limited in its proof to establishing the overt acts specified in the indictment." United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1984), cert. denied, 474 U.S. 994 (1985); see also United States v. Perez, 489 F.2d 51, 70 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974); United States v. Negro, 164 F.2d 168, 173 (2d Cir. 1947); Marcus v. United States, 20 F.2d 454, 456 (3d Cir.), cert. denied, 275 U.S. 565 (1927).³ As long as the defendant has knowledge that overt acts other than those alleged in the indictment may be proven at trial, his substantial rights are not prejudiced if the jury finds that he was guilty of conspiracy

³ The Ninth Circuit appears to have once adhered to a different view, see Fredericks v. United States, 292 F. 856 (1923), but it has not addressed the question recently, and it may have receded from its earlier position, see Marino v. United States, 91 F.2d 691, 694-695 (9th Cir. 1937) (noting that the overt act "is something apart from the conspiracy"), cert. denied, 302 U.S. 764 (1938). The Ninth Circuit has also stated that "[t]he government need not set out with precision every overt act committed," and that minor variances between the overt acts pled and those proven will rarely be fatal. See United States v. Bolzer, 556 F.2d 948, 950 (1977).

based on an overt act that was proven but not alleged. See United States v. Elliott, 571 F.2d 880, 911 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

Petitioner's reliance (Pet. 10) on United States v. Sacco, 436 F.2d 780, 783 (2d Cir. 1971), is misplaced. Sacco stands only for the proposition that the overt act must have occurred during the duration of the conspiracy. Although the court there upheld a jury instruction that the jury must find that "one of the overt acts alleged was committed by at least one of the defendants," ibid., the court was not addressing the question whether the jury may find a defendant guilty of conspiracy if it finds that the conspirators committed an overt act other than the ones pled in the indictment. The Second Circuit has expressly held that a conviction for conspiracy may be valid even when the overt act proven at trial is not one of those alleged in the indictment. See Negro, 164 F.2d at 173; see also United States v. Armone, 363 F.2d 385, 400 (2d Cir.), cert. denied, 385 U.S. 957 (1966).⁴

⁴ Although, as petitioner points out (Pet. 10-11), Armone was a prosecution for a narcotics conspiracy, in which proof of an overt act has since been held not to be required, see United States v. Shabani, 513 U.S. 10 (1994), the Armone court analyzed the case on the assumption that proof of an overt act was necessary to a conviction.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the question whether a willful violation of 18 U.S.C. 922(a)(1)(A) and 924(a)(1)(D) requires the jury to find that the defendant knew that dealing in firearms requires a license but nonetheless engaged in unlawful firearms dealing. In all other respects, the petition should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

JULY 1997

APPENDIX

JURY INSTRUCTIONS

[344] Because of the number of charges in the indictment, and because certain legal requirements pertain to more than one charge, I think it might be useful for me to state certain of these requirements in some detail at the outset and not to have to repeat them with respect to each of the charged counts.

As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes charged to you, I will on occasion explain that, before you can find the defendant [345] guilty, you must be satisfied that the defendant was acting knowingly and intentionally. Let me explain what is meant by these terms under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts deliberately and with the specific intent to do something the law forbids. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But, he must act with the specific intent to do whatever it is the law forbids. A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

* * * * *

(1a)

2a

[347] Now, the substantive charge in this indictment is contained in Count 2. The indictment reads:

On or about and between December 28, 1992, and August 31, 1993, within the Eastern District of New York and elsewhere, the defendant Sillasse Bryan, also known as Uzi, not being a licensed importer, licensed manufacturer, or licensed dealer of firearms, did knowingly and willfully engage in the business of dealing in firearms. 18 U.S.C. Section 922(a)(1)(A), 924(a)(1)(D), 2, and 3551.

Section 922(a)(1)(A) of Title 18 of the United States Code states in pertinent part that: It shall be unlawful for [348] any person, except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of dealing in firearms.

In order to sustain its burden of proof in this charge, the government must prove beyond a reasonable doubt the following two elements:

First, that on or about the dates set forth in the indictment the defendant knowingly and willfully engaged in the business of dealing in firearms, and second, that the defendant did not have a license as an importer, manufacturer or dealer in firearms.

* * * * *

[350] In this case, the government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that the defendant acted willfully. In order to satisfy this element, the

3a

government must prove that the defendant acted knowingly and purposely and that the defendant intended to commit an act which the law forbids.

4
No. 96-8422

Supreme Court, U. S.

FILED

JAN 23 1998

CLERK

In The
Supreme Court of the United States

October Term, 1997

— ♦ —
SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**
— ♦ —

JOINT APPENDIX
— ♦ —

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— ♦ —
**Petition For Certiorari Filed March 31, 1997
Certiorari Granted December 12, 1997**
— ♦ —

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**RELEVANT DOCKET ENTRIES
FROM U.S. DISTRICT COURT**

- | | | |
|----------|----|---|
| 7/21/95 | 1 | COMPLAINT as to Sillasse Bryan, Fnu Lnu, Nicole Bradley, Deloras Tillman [1:95-m -1136] (th) [Entry date 08/28/95] |
| 8/25/95 | 4 | INDICTMENT as to Sillasse Bryan (1) count(s) 1, 2 (11) [Entry date 08/30/95] |
| 9/8/95 | 7 | NOTICE of Appearance for Sillasse Bryan by Attorney Roger B. Adler (dd) [Entry date 09/08/95] |
| 9/27/95 | 9 | CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 9/27/95 at 10:15a.m. for status conference. Court Reporter/ ESR Mark Gjela. AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status conference held. Speedy trial info entered. Further status conference set for 11/21/95 at 5:00p.m. Defenswe [sic] motions to be filed 10/31/95. Govt response 11/14/95. (dd) [Entry date 10/10/95] |
| 12/22/95 | 15 | MOTION by Sillasse Bryan to Suppress; Motion Hearing/Return date of 9:30 1/28/96 for Sillasse Bryan [15-1] motion to suppress post arrest statements, grabnting [sic] a "Simmons" Hearing, ordering discovery, serve and file a Bill of Particulars, in liminie [sic]. Attached affidavit of Roger Adler in support of motions. Attached exhibits A-E. (dd) [Entry date 12/22/95] |
| 3/4/96 | 28 | CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. |

Trager on date of 3/4/96 at 9:30a.m. for suppression hearing. Court Reporter/ESR H. Driscoll. denying [15-1] motion to suppress as to Sillasse Bryan (1), Not Guilty: Sillasse Bryan (1) count(s) is, 2sAUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status conference for suppression hearing held. (dd) [Entry date 03-11-96]

- 3/11/96 31 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 3/11/96 at 2:15p.m. for jury trial Court Reporter/ESR M. Picozzi AUSA Elaine Banar. Defense counsel: Roger Bryan. Case called. Deft appear with counsel. Jurors sworn and trial begins. Govt opens. Deft opens. Jury trial held. Jury trial continued to 3/12/96 at 10:00a.m. (dd) [Entry date 03/12/96]
- 3/11/96 32 CALENDAR ENTRY as to Sillasse Bryan; Case called before Magistrate John L. Caden on date of 3/11/96 at 9:30a.m for jury selection Court Reporter/ESR Gene Rudolph. AUSA Elaine Banar/Alan Vinegrad. Case called. Counsel present. Consent to proceed before USMJ executed. Jury selected. Jury not sworn. (dd) [Entry date 03/13/96]
- 3/13/96 33 Deft Sillasse Bryan's Request to Charge. (1g) [Entry date 03/13/96]
- 3/13/96 34 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 2/13/96 at 11:30a.m. for jury trial. Court Reporter/ESR M.

Picozzi AUSA Elaine Banar. Defense counsel: [sic] Roger Bryan. Case called. Deft. appears with counsel, Jury trial held. Jury trial resumes. Jury trial continued to 3/14/96 at 10:00a.m. Deft rests. Govt summation. Deft summation. Govt rebuttal. Deft's rule 29 motion is denied. (dd) [Entry date 03/18/96]

- 3/14/96 36 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 03/14/96 at 10:00a.m. for jury trial. Court Reporter/ESR M. Picozzi, Guilty: Sillasse Bryan (1) count(s) 1s, 2s AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Jury trial ends. Jury charged, alternate jurors excused, U.S. M. sworn, and deliberations begin. Jurors polled and excused. (dd) [Entry date 03/18/96]
- 3/15/96 37 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on date of 3/15/96 at 3:30p.m. for status conference. Court Reporter/ESR M. Picozzi. AUSA Elaine Banar. Defense counsel: Roger Adler. Case called. Deft appears with counsel. Status confernece [sic] held. Sentencing set for 5/31/96 at 9:45a.m. Deft continued on bail. (dd) [Entry date 03/19/96]
- 3/21/96 40 MOTION by Sillasse Bryan to Set Aside Verdict. Motion Hearing/Return set for 10:15 on 4/19/96. (tj) [Entry date 04/17/96]
- 4/12/96 38 MEMORANDUM by USA as to Sillasse Bryan in opposition to defendant's

- motion for a new trial. (tj) [Entry date 04/15/96]
- 5/10/96 42 LETTER dated 5/9/96 from Roger B. Adler, Esq. to Judge Trager in reply to the government's opposition to defendant's motion to set aside the jury verdict. (tj) [Entry date 05/14/96]
- 6/3/96 44 CALENDAR ENTRY as to Sillasse Bryan; Case called before Judge David G. Trager on 6/3/96 for sentencing. AUSA: Elaine Banar. Defense Attorney: Roger Adler. Court Reporter: Allan Sherman. Defendant sentenced on count (1) and (2) to 57 months of imprisonment and 3 years of supervised release. Underlying indictment is dismissed. Special Assessment: \$100.00. Defendant to participate in a drug treatment program. (tj) [Entry date 07/02/96]
- 6/3/96 - DISMISSAL of Count(s) on Government Motion as to Sillasse Bryan Termination motions: Counts Dismissed: Sillasse Bryan (1) count(s) 1, 2. (tj) [Entry date 07/03/96]
- 6/28/96 45 JUDGMENT Sillasse Bryan (1) count(s) 1s, 2s. Defendant sentenced to 57 months of imprisonment. The court that the defendant be placed in the Boot Camp Program when he reaches that part of his sentence. Supervised release: 3 years. The defendant shall participate in a drug treatment program as directed by the Probation Department, the defendant shall submit his person, residence, and place of business to a search as directed by the Probation, and the defendant

- shall not possess a firearm or device. Special Assessment: \$100.00. Underlying indictment dismissed on government's motion. (Signed by Judge David G. Trager on 06/03/96) (tj) [Entry date 07/03/96]
- 7/3/96 46 NOTICE OF APPEAL by Sillasse Bryan (1) count(s) 1s, 2s. The defendant appeals the judgment that was entered on 7/3/96. NO FEE PAID for the defendant has a CJA attorney. Forms distributed. USCA notified. PLEASE NOTE: THIS NOA WAS ORIGINALLY FILED ON 6/7/96. (mcg) [Entry date 07/08/96]
- 7/8/96 - Notice of appeal and certified copy of docket as to Sillasse Bryan to USCA:
- [46-1] appeal (mcg) [Entry date 07/08/96]
-

**RELEVANT DOCKET ENTRIES FROM
SECOND CIRCUIT COURT OF APPEALS**

7/9/96 Copy of District Court docket entries and notice of appeal on behalf of Appellant Sillasse Bryan filed. [96-1450] (cr16)

7/10/96 Scheduling order no. 1 filed, continuing counsel: Roger B. Adler, Esq. pursuant to CJA. Record on appeal due on 7/30/96. Appellant brief and joint appendix due on 8/29/96. Appellee's brief due on 9/30/96. Response Anders brief due on 9/12/96. Argument as early as week of 10/21/96. (cr16)

7/10/96 CJA voucher issued to counsel: Roger B. Adler, Esq. for Sillasse Bryan (Voucher #: 0673072) [96-1450] (cr16)

8/12/96 Record on appeal index in lieu of record filed. (cr16)

8/16/96 Letter dated 8/15/96 from Roger B. Adler, Esq. regarding motion for extension received (cr16)

8/16/96 Appellant Sillasse Bryan motion for enlargement of time within which to perfect appeal FILED (w/pfs). [843528-1] (cr16)

8/16/96 Order FILED GRANTING motion for extended time [843528-1] by Appellant Sillasse Bryan, endorsed on motion form dated 8/16/96. Extended appellant's brief due date is 9/20/96. Extended appellee's brief due date is 10/21/96. Extended argument week as early as 11/4/96. (BJM) Cancel response to Anders brief due. (cr16)

9/20/96 Appellant Sillasse Bryan brief FILED with proof of service. (cr16)

9/20/96 Appellant Sillasse Bryan appendix filed w/pfs. Number of volumes: 1. (cr16)

10/22/96 Appellee USA brief filed with proof of service. SERVICE BY MAIL. (cr16)

12/5/96 Proposed for argument the week of 1/27/97. (ca96)

12/18/96 Set for argument on 1/29/97. [96-1450] (ca96)

1/29/97 Case heard before WALKER, PARKER, HEANEY C.JJ. (TAPE: #142) (ca95)

2/10/97 Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion filed. (JMW) (cr16)

3/3/97 Judgment MANDATE ISSUED. (cr16)

3/26/97 Mandate receipt returned from the district court. (ren)

4/4/97 Notice of filing petition for writ of certiorari for Appellant Sillasse Bryan dated 4/2/97 filed. Supreme Ct#: 96-8422. (cr16)

7/11/97 Appellee USA motion to publish summary order as opinion FILED (w/pfs). (cr12)

7/18/97 Appellant Sillasse Bryan response to the motion to publish summary order with proof of service filed. (cc: Panel) (cr12)

9/4/97 Order FILED GRANTING motion to publish summary order as opinion [1011322-1] by Appellee USA, endorsed on motion form dated 7/11/97. (Per: JMW, FIP, GWH) (cr12)

9/4/97 Non-dispositive opinion filed, from order GRANTING motion to publish summary order as opinion [1011322-1] by Appellee USA, endorsed on motion form dated

7/11/97. Judgment of the U.S. District Court for the Eastern District of New York AFFIRMED by published signed PER CURIAM opinion filed. (Originally decided by summary order filed 2/10/97; publishing the substance of the prior summary order in this per curiam opinion) (cr12)

9/12/97 Note: the OPINION PRICE is \$ 1.40 (rek)

9/12/97 Slip opinion for Appellant Sillasse Bryan, Appellee USA received. (cr10)

12/18/97 Notice from Supreme Court granting Appellant Sillasse Bryan petition for a writ of certiorari is granted with scheduling order. (cr10)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
UNITED STATES OF AMERICA	<u>INDICTMENT</u>
- against -	Cr. No. CR-95-765
SILLASSE BRYAN,	(18 U.S.C. §§ 371,
also known as "Uzi,"	922(a)(1)(A),
Defendant.	924(a)(1)(D),
-----X	2 and 3551 <i>et seq.</i>)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between August 6, 1992 and August 31, 1993, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, together with others, did knowingly and intentionally conspire to violate Title 18, United States Code, Section 922(a)(1)(A), by willfully engaging in the business of dealing in firearms.

In furtherance of said conspiracy, and to effect its objects, the defendant SILLASSE BRYAN, also known as "Uzi," and others, committed and caused to be committed the following:

OVERT ACTS

1. On or about December 28, 1992, SILLASSE BRYAN paid another individual approximately \$300 in United States currency to purchase two firearms.

2. On or about December 28, 1992, SILLASSE BRYAN took possession of the two firearms referred to in Overt Act One.

3. On or about February 10, 1993, SILLASSE BRYAN took possession of two firearms which another individual had purchased for him.

(18 U.S.C. §§ 371 and 3551 *et seq.*)

COUNT TWO

On or about and between December 28, 1992 and August 31, 1993, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, did knowingly and willfully engage in the business of dealing in firearms.

(18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), 2 and 3551 *et seq.*)

A TRUE BILL

FOREPERSON

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Barbara D. Underwood
ACTING UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
UNITED STATES OF AMERICA	SUPERSEDING
- against -	<u>INDICTMENT</u>
SILLASSE BRYAN,	Cr. No.
also known as "Uzi,"	95-786 (S-1) (DGT)
	(18 U.S.C. §§ 371,
Defendant.	922(a)(1)(A),
-----X	924(a)(1)(D),
	2 and 3551 <i>et seq.</i>)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between August 6, 1992 and August 31, 1993, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, together with others, did knowingly and intentionally conspire to violate Title 18, United States Code, Section 922(a)(1)(A), by willfully engaging in the business of dealing in firearms.

In furtherance of said conspiracy, and to effect its objects, the defendant SILLASSE BRYAN, also known as "Uzi," and others, committed and caused to be committed the following:

OVERT ACTS

1. On or about December 28, 1992, SILLASSE BRYAN paid another individual approximately \$300 in United States currency to purchase two firearms.

2. On or about December 28, 1992, SILLASSE BRYAN took possession of the two firearms referred to in Overt Act One.

3. In or about December 1992, SILLASSE BRYAN took the two firearms referred to in Overt Act One to Brooklyn, New York.

4. On or about February 10, 1993, SILLASSE BRYAN took possession of two firearms which another individual had purchased for him.

(18 U.S.C. §§ 371 and 3551 *et seq.*)

COUNT TWO

On or about and between December 28, 1992 and August 31, 1993, within the Eastern District of New York and elsewhere, the defendant SILLASSE BRYAN, also known as "Uzi," not being a licensed importer, licensed manufacturer or licensed dealer of firearms, did knowingly and willfully engage in the business of dealing in firearms.

(18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), 2 and 3551 *et seq.*)

A TRUE BILL

FOREPERSON

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Barbara D. Underwood
ACTING UNITED STATES ATTORNEY
PURSUANT TO 29 C.F.R.

PETITIONER'S REQUEST #2

SUBSTANTIVE OFFENSE

In order to sustain its burden of proof for the crime charged in count 2 the Government must prove beyond a reasonable doubt:

- (1) That the Defendant SILLASSE BRYAN engaged in the business of dealing in firearms;
- (2) The Defendant was, at the time charged, not then a federally licensed firearms dealer;
- (3) The Defendant acted willfully.

2 Devitt & Blackmar "Federal Jury Practice and Instructions" 36.03 [West Publishing Co. 1990] We respectfully ask the Court to charge the jury specifically on the term "business" as utilized in 18 USC 922(a)(1)(a) to distinguish from the mere act of possession or sporadic transfer. The Court should emphasize the need for ongoing systemic conduct for profit.

PETITIONER'S REQUEST #3SPECIFIC INTENT

The Defendant SILLASSE BRYAN is charged with violations of the Federal Firearms Law. The sections of law which he is charged under require a specific intent to violate the law.

The term "knowingly" as used in these instructions means that he or she was:

- (1) aware of his actions;
- (2) knew what was happening; and
- (3) did not act out of
 - (a) ignorance;
 - (b) carelessness;
 - (c) mistake;
 - (d) accident.

Should you find that the Defendant SILLASSE BRYAN so acted or are unclear why he acted, then you may find a reasonable doubt. 2 Devitt & Blackman "Federal Jury Practice and Instructions," Sec. 17.03 & 17.04 [West 4th Ed., 1990]

PETITIONER'S REQUEST #8KNOWLEDGE OF THE LAW

The Federal Firearms Statute which the Defendant is charged with, conspiracy to violate and with allegedly violated, is a specific intent statute. You must accordingly find, beyond a reasonable doubt, that Defendant at all relevant times charged, acted with the knowledge that it was unlawful to engage in the business of firearms distribution lawfully purchased by a legally permissible transferee or gun purchaser.

In determining Defendant's state of mind and knowledge during this period of time (late December, 1992 through late February, 1993) you may consider the Defendant's educational, social and informational background (and gay) in determining whether he received the weapons both at a time and under circumstances when he knew that his alleged possession and subsequent transfer were in violation of USI 922(a).

You may not engage in speculation conjecture or surmise in determining Defendant's knowledge and intent. You must consider only the proof admitted at the trial. The test is not what he could have known, may have known or should have known under the circumstances. Rather, you must be persuaded that with the actual knowledge of the federal firearms licensing laws Defendant acted in knowing and intentional violation of them. "Modern Federal Jury Instructions" 8.05 [Siffert & Sand] *United States v. Ratzlaff, U.S.*

* * *

[p. 322] MR. ADLER: Page 23 of Your Honor's proposed charge speaks about license. Ratzlaff against United States, 114 Supreme Court 655, and a number of other cases about specific knowledge dealing with the knowledge of people dealing with this and so on. I take issue with the language the Court used. I submit that the government was required to prove that [p. 323] he knew and engaged in the conduct that such a license was required.

THE COURT: Go to the Supreme Court and see if they agree. I will not put the end to this statute.

* * *

[p. 344] As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes charged to you, I will on occasion explain that, before you can find the defendant [p. 345] guilty, you must be satisfied that the defendant was acting knowingly and intentionally. Let me explain what is meant by these terms under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts deliberately and with the specific intent to do something the law forbids. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But, he must act with the specific intent to do whatever it is the law forbids. A person acts willfully if he acts intentionally and purposely and with the intent to do

something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

* * *

[p. 349] The evidence in this case contains a certificate [p. 350] showing that after a diligent search of all of the records maintained by the Secretary of the Treasury relative to the issuance or denial of firearms licenses, it was determined that the defendant, Sillasse Bryan, never executed or filed an application for a federal firearms license. From such evidence you may find that the government has sustained its burden of proving beyond a reasonable doubt that the defendant was not licensed under the Gun Control Act to deal in firearms.

In this case, the government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that the defendant acted willfully. In order to satisfy this element, the government must prove that the defendant acted knowingly and purposely and that the defendant intended to commit an act which the law forbids.

* * *

UNITED STATES of America, Appellee,

v.

Sillasse BRYAN, aka "Uzi,"
Defendant-Appellant.

No. 884, Docket 96-1450

United States Court of Appeals,
Second Circuit.

Argued Jan. 29, 1997.

Decided Feb. 10, 1997.

Published Sept. 4, 1997.

Roger Bennet Adler, New York City, for Defendant-Appellant.

Elaine D. Banar, Assistant United States Attorney (Zachary W. Carter, United States Attorney, Susan Corkery, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY, on brief), for Appellee.

Before: WALKER, PARKER, and HEANEY,* Circuit Judges.

PER CURIAM:¹

Sillasse Bryan appeals from a judgment of conviction of the United States District Court for the Eastern District

* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

¹ This appeal was resolved by summary order on February 10, 1997. Upon request of the parties and because we conclude that publication is warranted, we issue this opinion which in substance restates and expands upon that order.

of New York (David G. Trager, *Judge*). Bryan was convicted on July 3, 1996, after a jury trial, of conspiring to engage in the sale of firearms without a license as well as actually engaging in the sale of firearms without a license in violation of 18 U.S.C. §§ 371, 922(a)(1)(A). The Court sentenced Bryan to a term of 57 months in prison and to supervision upon release for three years.

Bryan seeks reversal of his conviction on three grounds: first, that the jury had before it insufficient evidence upon which to convict him of the violations charged; second, that the court erred in failing to charge the jury properly with respect to the credibility of certain witnesses for the government; and, third, that the court erred in instructing the jury that an overt act not set forth in the indictment may constitute an act in furtherance of a conspiracy under 18 U.S.C. § 371. Each of these claims is without merit.

Bryan's first contention is that the jury had insufficient evidence on which to convict him of the willfulness necessary under 18 U.S.C. § 922(a)(1). Defendant's argument, however, rests on a misunderstanding of the law of this circuit. The willfulness element of unlawful sale of firearms does not require proof "that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute." See *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir.1995). Rather, this circuit reads the willfulness requirement more "broadly . . . requir[ing] only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *United States v. Collins*, 957 F.2d 72, 76 (2d Cir.1992). Thus, while we acknowledge

that several of our sister circuits have construed the law more narrowly, *see, e.g., United States v. Sanchez-Corcino*, 85 F.3d 549, 553 (11th Cir.1996) (holding that "in order for the Government to prove the offence of willfully dealing in firearms without a license . . . it must prove that the defendant acted with knowledge of the licensing requirement"), defendant's argument for such a construction of the law in this circuit is foreclosed.

With the proper understanding of the requirement of willfulness in this circuit, defendant's insufficiency argument is unavailing. It is axiomatic that a defendant faces a heavy burden when challenging the sufficiency of the evidence to support a jury's verdict. *See, e.g., United States v. Soto*, 716 F.2d 989, 991 (2d Cir.1983). In passing on such a challenge, the court views the evidence in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979). At trial, the government elicited ample proof that defendant's conduct "was knowing and purposeful" and that he "intended to commit an act which the law forbids." *United States v. Collins*, 957 F.2d at 76. In brief, the government established that Bryan made several trips from his home in New York City to Ohio for the purpose of purchasing firearms that he was unable to obtain legally in New York; that he enlisted the aid of two Ohio women to purchase the firearms on his behalf, knowing that in Ohio purchase was possible with an in-state driver's license alone; that he provided the women the funds to purchase the guns and accompanied them to the dealer; that Bryan confessed to purchasing firearms in Ohio with the intention of transporting them to New York for resale; and, most important, that defendant removed the serial

numbers of the firearms purchased to avoid detection. Viewed in the light most favorable to the government, this evidence is sufficient to establish that Bryan knowingly intended to commit an act which the law forbids. *Id.*

Defendant's second argument on appeal concerns the court's instructions regarding the credibility of two of the government's witnesses, women who aided Bryan in purchasing firearms during his trips to Ohio. As an initial matter, we note that defendant's counsel failed to object to the credibility charge given by the district court. Joint Appendix 128-29. Thus, notwithstanding the inclusion of the sought after charge in defendant's proposed instruction submitted to the court, we review for plain error. *See, e.g., United States v. Wong*, 40 F.3d 1347, 1373 (2d Cir.1994). In order for a plain error to be noticed under Fed.R.Crim.P. 52(b), that error must "(1) be actual error; (2) be plain, which is synonymous with clear or obvious under current law; and (3) affect substantial rights, which, in most cases, means that the error must have affected the outcome of the proceeding." *United States v. Gonzalez*, 110 F.3d 936, 945-46 (2d Cir.1997) (citing *United States v. Olano*, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993)). However, even if an error was committed, it was clear, and it affected substantial rights, we may reverse in our discretion. *See Olano*, 507 U.S. at 736, 113 S.Ct. at 1778 (directing appellate court to exercise discretion in such cases "only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings") (internal quotation marks omitted).

Defendant's first contention in this regard surrounds his unsuccessful efforts to have the court instruct the jury

that two of the government's witnesses were drug abusers and that they were abusing drugs at the time certain events at issue allegedly occurred. Even assuming that refusal to give this instruction was error and was clear at the time – matters we seriously doubt – we cannot conclude that the district court's refusal "affect[ed] substantial rights." Fed.R.Crim.P. 52(b). In order for an error to affect substantial rights, "[i]t must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777 (citing cases). However, in the "plain error" context, the defendant bears the burden of persuasion with respect to prejudice, *see id.*, and he has failed to shoulder that burden in this case. The district court thoroughly and carefully instructed the jury on credibility determinations. In fact, the court specifically instructed the jury that "[y]ou should carefully scrutinize all of the testimony given, the circumstances under which each witness testified, and every matter in evidence that tends to show whether a witness is worthy of belief." Joint Appendix at 104. The district court's general charge – together with any evidence elicited by the defense as to the witnesses' history of drug use – was sufficient in this case to alert the jury to their responsibilities in making credibility determinations.

Defendant's second contention regarding the district court's charge to the jury is that the court's instruction insufficiently addressed the conflict inherent in accomplice testimony. Here we find that the district court committed no error, let alone plain error. The district court took care to instruct the jury of the dangers of accomplice testimony and of the need to give the two witnesses'

testimony special attention because both had entered into cooperation agreements with the government. In part, the district court charged:

Because of the very nature of accomplice testimony . . . it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe. You should, for example, ask yourselves whether an accomplice witness would benefit more by lying or telling the truth.

Joint Appendix at 108. Moreover, after specifically identifying the government's two accomplice witnesses and mentioning their plea agreements, the court instructed:

The government is permitted to enter into such agreements. But witnesses who testify pursuant to such agreements have an interest in this case different from an ordinary witness. This is why you must carefully scrutinize whether the testimony of such a witness was made up in any way because the witness believed or hoped that he would receive favorable treatment by testifying falsely.

Id. at 109. In light of this language, defendant's contention that the district court erred is meritless.

Finally, defendant argues that the district court erred in charging the jury that an overt act not included in the indictment can constitute the foundation of a conspiracy conviction. Defendant's argument fails. The court has specifically held that a conspiracy "conviction may rest on an overt act not charged in the indictment." *United States v. Armone*, 363 F.2d 385, 400 (2d Cir.1966).

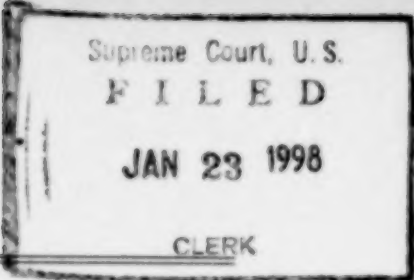
For the foregoing reasons, we find defendant's arguments to be without merit. Accordingly, we affirm the judgment of the district court.

Friday, December 12, 1997 Certiorari Granted

96-8422 BRYAN, SILLASSE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari are granted limited to Questions 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.

(5)



No. 96-8422

In The
Supreme Court of the United States
October Term, 1997

— ♦ —
SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**
— ♦ —

BRIEF FOR PETITIONER
— ♦ —

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QUESTIONS PRESENTED

1. Was the evidence at trial legally sufficient to convict a then 19-year old Petitioner of unlawfully dealing in firearms, in the absence of proof that he knew that he was required to possess a Federal Firearms Dealer's License?
2. Was the Court's jury charge legally deficient because it failed to require a finding of Petitioner's knowledge that a Federal Firearm Dealer's License was required, thereby unconstitutionally diminishing the Government's burden of proof?

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OPINION BELOW

Per Curiam

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (J.A. 20-26)* is reported at 122 F.3d 90 (2d Cir. 1997). The District Court filed no reported decision.

JURISDICTION

Petitioner appeals from an order of the United States Court of Appeals filed on February 10, 1997 (the mandate was issued on March 3, 1997) which unanimously affirmed, in a *per curiam*, subsequently published opinion (122 F.3d 90 (2d Cir. 1997)) a judgment of the United States District Court, Eastern District of New York (Trager, J.) entered on June 3, 1996 upon a jury verdict convicting Petitioner of both conspiring to deal and dealing in firearms without a federal firearms license in violation of 18 U.S.C. § 371, 18 U.S.C. § 922(a)(1)(A), and 18 U.S.C. § 924(a)(1)(D), and imposing a 57 month sentence. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition of Certiorari was granted on December 12, 1997.

* Page citations preceded by "J.A." refer to the Joint Appendix.

STATUTES INVOLVED

18 U.S.C. § 371 states:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 922(a)(1)(A)

Unlawful acts

It shall be unlawful for any person – except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; . . .

18 U.S.C. § 924(a)(1)(A)-(D)

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever –

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm, or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT OF THE CASE

1. Proceedings in the District Court

Petitioner, SILLASSE BRYAN, of Brooklyn, New York was indicted by an Eastern District of New York Grand Jury for the crimes of conspiracy to distribute firearms without a federal firearms dealer's license (18 U.S.C. § 371) and with a substantive violation of 18 U.S.C. § 922(a)(1)(A) involving handguns allegedly purchased in Columbus, Ohio by intermediary purchasers (so called "Straw Purchasers") 53 year old Delores Marie Tillman, and Nicole Bradley.

The firearms in issue were purchased in 1993 from local gun shops, upon presentation by the "straw purchaser" of a valid Ohio drivers license, and payment of the applicable sale price. The laws of Ohio do not limit the number of weapons which can be purchased.

Delores Tillman testified under a cooperation agreement, acknowledging theft convictions in 1961, and 1989. Following her 1996 arrest for gun trafficking, she agreed to cooperate, and entered into a "deferred prosecution" agreement with the Government. Her trial testimony, presumably credited by the jury, established her purchase of .380 Lorcin pistols, utilizing a bogus photo identification bearing the name "Delores Kenzer." The pistols were allegedly given to Petitioner in exchange for \$300.00. The pistols were subsequently transported to New York, and distributed there.

Nicole Bradley, the second "straw purchaser" bought pistols utilizing her own name, but admitted having knowingly lied on the pistol purchase application. She testified she gave them to Petitioner, in exchange for money.

Ms. Bradley was not formally arrested on a complaint until February 4, 1996 (5 weeks prior to trial). In 1991 she was convicted of forgery. In 1993 she was arrested for theft, and sentenced, in turn, to serve an 18 month jail sentence.

Ms. Bradley pleaded guilty, and testified under a "cooperation agreement."

In addition to the testimony of the two "cooperators," the jury heard testimony that a search of Bureau Of Alcohol, Tobacco and Firearms (hereafter A.T.F.) files

revealed no record of Petitioner holding a firearms dealer's license.

Detective James Ward of the A.T.F. Task Force testified that following the Petitioner's arrest on August 15, 1995, and after Miranda warnings, Petitioner acknowledged travelling to Columbus, Ohio, soliciting various individuals, including Tillman, to purchase firearms for him and transporting the weapons himself, or with the help of others, to New York, where they were sold in various Brooklyn locations for \$500.00 each (T 218-20). Although Detective Ward testified that he neither tape-recorded the post-arrest statement, nor obtained the Petitioner's signed acknowledgement of the confession, he made "verbatim notations" of Bryan's statement (T 230-32).

Testimony was thereafter received from six New York City Police Officers identifying six of the firearms purchased in Columbus, Ohio that were ultimately seized at various locations in Brooklyn and Manhattan, New York (T 177-98, 201-06, 246-50).

At the conclusion of the Government's case, Petitioner moved pursuant to Rule 29 for a directed verdict. The Court denied the motion.

The Petitioner did not testify in his own behalf, the sole defense witness was Petitioner's mother Ernestine Bryan. She testified that Petitioner was learning impaired, and attended local public schools where he was assigned to "Special Education" classes. He was never promoted beyond the 9th grade, and dropped out of school.

At the conclusion of the entire case, Petitioner unsuccessfully renewed his Rule 29 motion.

THE COURT'S CHARGE

With respect to the issue of *mens rea*, counsel requested that the Court charge that the Government must prove that Petitioner knew of the dealer license requirement, and that Petitioner engaged in the conduct notwithstanding the need for such a license (J.A. 17). The Court declined to so charge (J.A. 18). Instead, the Court charged the jury:

"As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes charged to you, I will on occasion explain that before you can find the defendant guilty, you must be satisfied that the defendant was acting knowingly and intentionally. Let me explain what is meant by these terms under the law.

"A person acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts deliberately and with the specific intent to do something the law forbids. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But, he must act with the specific intent to do whatever it is the law forbids. A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person

need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids" (J.A. 18-19).

* * *

"The government is not required to prove that the defendant knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law" (J.A. 18-19).

THE VERDICT

At the conclusion of its deliberations, the jury returned a guilty verdict on both counts.

POST-VERDICT MOTION

Petitioner moved, pursuant to Rule 33, to set aside the jury's verdict, contending that the Court's charge was legally erroneous because it failed to require the Government to prove that he must have known of his need to possess a Federal Firearms Dealer's License. The Court denied the motion.

THE SENTENCE

On June 3, 1996, the Court sentenced Petitioner to serve 57 months imprisonment under the custody of the Attorney General. A timely Notice of Appeal was filed.

Petitioner is currently serving his sentence in the custody of the Bureau of Prisons.

SECOND CIRCUIT HOLDING ON APPEAL

On appeal, the Court of Appeals for the Second Circuit affirmed (*United States v. Bryan*, 122 F.3d 90 (2d Cir. 1997)). (J.A. 20-26). The Court, adhering to its prior decisions, held that "willfully" in 18 U.S.C. § 924(a)(1)(D) requires " 'only that the government prove that the petitioner's conduct was knowing and purposeful and that the petitioner intended to commit an act which the law forbids.' " *Id.* at 91, quoting *United States v. Collins*, 957 F.2d 72, 76 (2d Cir. 1992), *cert. denied*, 504 U.S. 944 (1992). The Court recognized that several other Circuits have construed the law differently (122 F.3d at 91), but it adhered to its view (*see also United States v. Allah*, 130 F.3d 33 (2d Cir. 1997), *cert. filed*, no. 97-6915 Nov. 26, 1997).

On December 12, 1997, this Court granted certiorari in order to resolve the conflict among the Circuits.

SUMMARY OF ARGUMENT

The enactment of the Firearms Owners Protection Act (FOPA) in 1986 (Pub. Law No. 99-308, 100 Stat. 449) followed a seven-year legislative initiative by firearms enthusiasts, sportsmen, and those concerned about the spread of federal influence on local matters, and marked the inclusion of the *mens rea* state of "willfulness" as a

requirement for prosecution of sellers of firearms without a federal firearms dealers license.

In the case at bar, the weapons in question were purchased in the State of Ohio, a State which had no firearm owner's licensing requirement, and were acquired by Petitioner, ultimately finding their way to New York. At Petitioner's trial, and notwithstanding written request (J.A. 17) and subsequent objection, the Trial Judge charged the jury that the proof of knowledge of the licensing requirement was not an element which must be proved. (J.A. 18-19).

Petitioner notes that, as of December 31, 1997, five Circuit Courts of Appeals have held that Congress intended that a person could be convicted of "willfully" dealing in firearms without a license only if he or she was aware of the federal licensing requirement and intended to violate it (*United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996); *United States v. Hayden*, 64 F.3d 126 (3rd Cir. 1995); *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994); *United States v. Hern*, 926 F.3d 764 (8th Cir. 1991); *United States v. Rodriguez*, 1997 WL 797506 *2-*4 (5th Cir. 1997)). On December 12, 1997, this Court granted *certiorari* in order to resolve the conflict among the Circuits.

Petitioner contends that the statutory use of "willfully" requires such proof and that by failing to charge the jury properly, the Government's proof was unconstitutionally lessened.

ARGUMENT

PETITIONER'S CONVICTION FOR WILLFULLY VIOLATING THE FEDERAL FIREARMS DEALER STATUTE'S LICENSING PROVISION REQUIRES PROOF OF KNOWLEDGE OF THE LICENSING REQUIREMENT.

The presence and proof of "*mens rea*" (vicious will or intent) has long been the hallmark of criminal felony level prosecutions (*Morrisette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 96 L.Ed. 286, 294 (1952); *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (local felon registration requirement invalid where petitioner unaware of registration requirement)).

In a quarter century of increasing congressional involvement and possible encroachment into areas previously the responsibility of the State and local authorities, numerous federal incursions have resulted in regulatory enactments in a variety of fields deemed constitutionally (but *cf. United States v. Lopez*, 514 U.S. 549 (1995)) appropriate, to control and penalize those violating the statutory scheme.

In one early such case, *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), the conviction of a Chicago, Illinois sandwich shop owner for unlawful possession of food stamps was reversed, for although Moon's Sandwich Shop was not authorized by the Department of Agriculture to accept food stamps, absent proof that the defendant knew he was violating the statute or regulation.

In *United States v. United States Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) this Court

upheld, in an opinion by Chief Justice Burger, a determination by the United States Court of Appeals for the Third Circuit reversing the conviction of a large Pennsylvania-based gypsum manufacturer, and a number of prominent gypsum industry corporate officials for Sherman Act violations, holding that proof of criminal intent, and not a mere reliance upon "knowing" conduct and resulting effect on market price was required.

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604 (1991) held, in the context of a prosecution of an apparently worldly, sophisticated, politically motivated and well-paid pilot for American Airlines, that notwithstanding his failure to file federal income tax returns for several years, it was not enough to prove Cheek's failure to file, but rather that a criminal prosecution required proof of an intentional violation of a *known* legal duty. Proof simply establishing the absence of filed tax returns would not rebut the possibility of mistake, ignorance or negligence.

In *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) a closely divided Court reversed petitioners' convictions for *willfully* structuring currency transactions in violation of Treasury Department regulations, absent proof that petitioners knew their conduct violated the law (*see also United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Aversa*, 984 F.2d 493 (1st Cir. 1993) and the concurring opn. of Breyer, J., pp. 502-503). The Court of Appeals for the Second Circuit had earlier ruled that convictions for structuring were proper, even absent proof of petitioner's knowledge of the CTR requirement (*see United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990)).

In addition, in *Staples v. United States*, 511 U.S. 600 (1994), this Court held, in the context of a prosecution for unlawful possession of an unregistered "firearm" (there a machine gun), that the Government was required to prove that the petitioner knew that the weapon he possessed had the features and characteristics which make a weapon a machine gun, within the regulatory purview of 26 U.S.C. § 5861.

In the instant case, the indictment charged the violation of 18 U.S.C. § 922(a)(1)(A). Read together with the penalty provision in 18 U.S.C. § 924(a)(1)(D), only a person who "willfully violates" § 922(a)(1)(A) may be convicted.

The statute in question consists of two discrete *identified* mental states, both "knowingly" (18 U.S.C. § 924(a)(1)(A)(B)(C)) and "willfully" (18 U.S.C. § 924(a)(1)(D)). Thus, when Congress determined to legislate in the area of possession and transfer of firearms, it had a wide range of well-defined mental states from which to, and did select, in determining when a crime would be recognized. Indeed, § 924 uses "knowingly" on three occasions and "willfully" but once (18 U.S.C. § 924(a)(1)(D)).

Particularly as the possession of firearms enjoys constitutional recognition and protection (U.S. Constitution, Amendment II), and where the manner and means in which possession and transfers of firearms was traditionally a matter of local concern,¹ the utilization of a

¹ Indeed, in the State of Ohio, where the underlying facts in this case occurred, there is no permit requirement for firearm purchases. The display of proof of adult age and an assertion of

willful mental state for those who endeavor to deal in firearms was a choice of critical significance.

THE STATUTORY LANGUAGE AT ISSUE

It has long been recognized that "willful . . . is a word of many meanings, its construction often being influenced by its context" (*Spies v. United States*, 317 U.S. 492, 497 (1943); accord *Ratzlaf v. United States*, *supra*, 114 S.Ct. 655, 659 (1994)). This Court has instructed that in attempting to discern the meaning of words of intent written into a statute, judges must remain "mindful of the complex of provisions in which they are embedded" (*Ratzlaf*, 114 S.Ct. at 659; see *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (the meaning of statutory language "depends on context"). Thus, in determining the meaning of the word "willfully" in FOPA, the focus is on the "context of the term's use within the overall structure of the statute" (*United States v. Obiechie*, 38 F.3d at 313-14; accord *Sanchez-Corcino*, 85 F.3d at 553 & n.1.). When viewed fairly, the structure and context of the firearms statutes establishes that Congress intended "willfully" to mean the intentional violation of a known legal duty.

First, an analysis of the structure of § 924(a)(1) supports this conclusion. As the Seventh Circuit has noted, of the four subsections, (A), (B), and (C) require that a petitioner act "knowingly," while (D) alone requires a

non-disqualifying characteristics suffice to authorize a legitimate firearms transaction.

willful violation of the law. "Congress' use of the term 'willfully' in subsection (D) indicates that it intended a *scienter* standard there that is distinct from the 'knowingly' requirement of the previous three subsections" (*Obiechie*, 38 F.3d at 314). The *Obiechie* court agreed with the decision in *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988), that the use of both "knowingly" and "willfully" in different parts of § 924 was significant. Given that the two words must have different meanings when used in the same section, *Obiechie* reasoned that "willfully must mean something more than knowingly [.]". 38 F.3d at 315. The "only reasonable distinction between Section § 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law." *Obiechie* at 315; accord *Rodriguez*, 1997 WL 797506 at *3. That is, "willfulness" refers to the "voluntary, intentional violation of a known legal duty." *Id.* at 315, quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991); accord *Sanchez-Corcino*, 85 F.3d at 553-54; *Hayden*, 64 F.3d at 130.

An analysis of the firearms law as a whole and of FOPA in particular leads to the same result.

At the time Congress passed FOPA, the federal firearms statute already provided, in (18 U.S.C. § 923(d)(1)(C) & (D)) for denial or revocation of a license to deal in firearms if the applicant or licensee "willfully" violated the Gun Control Act or "willfully" failed to disclose required information. Courts interpreting this provision had ruled consistently that "willfully" in § 923 meant that the applicant or dealer must have intentionally violated, or recklessly disregarded a known legal duty (*Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980); *Perri v. Dept. of the Treasury*, 637 F.2d 1332, 1336 (9th

Cir. 1981); *Primo v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979); *Lewin v. Blumenthal*, 590 F.2d 268, 269 (8th Cir. 1979); *Shyda v. Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F.Supp. 409, 415 (M.D. Pa. 1977)).

As this Court reaffirmed in *Ratzlaf*, "A term appearing in several places in a statutory text is generally read the same way each time it appears." 114 S.Ct. at 660. When it passed § 924, Congress knew that § 923 already described a willful actor as one who violates a known legal duty (*see Ratzlaf*, 114 S.Ct. at 659-60). Since Congress chose to use the same term "willfully" when enacting § 924, the word should be given the same meaning in this section as well (*see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning").

In addition, FOPA added another provision to the gun laws that illuminates the meaning of "willfully" in § 924(a)(1). A new section of the law, 18 U.S.C. § 922(b)(3), permits a licensed gun dealer to make a face-to-face sale of a rifle or shotgun to a resident of another state, so long as the sale fully complies with the laws of both states. That same section provides that "the dealer shall be presumed, for purposes of this sub-paragraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States." Criminal violations of § 922(b)(3) are governed by the same *mens rea* standard that is at issue here – "willfully" in § 924(a)(1)(D). The presumption that dealers have actual knowledge of state gun laws serves no purpose, unless evidence that the dealer knew the relevant law is needed to establish a willful violation.

Under the definition of "willfully" adopted by the Second Circuit, there is no requirement that the prosecution prove that a petitioner violated a known legal duty, and thus no purpose to the presumption. Thus, the Second Circuit's reading would reduce the presumption provision to "surplusage - words of no meaning" (*Ratzlaf*, 114 S.Ct. at 659). But "[j]udges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Id.* If, however, as the other Circuits have held, a willful violation does require proof that the petitioner violated a known legal duty, then the presumption provision represents a decision by Congress to put the burden on gun dealers to familiarize themselves with relevant state laws before making an interstate sale. Logically, then, "willfully" in § 924 must mean the violation of a known legal duty when applied to a violation of § 922(b)(3). And the same word in the same section - "willfully" in § 924 - must be given the same meaning when it is applied to a violation of § 924(a)(1). *Ratzlaf*, 114 S.Ct. at 660 (courts should "construe a single formulation . . . the same way each time it is called into play").

Finally, both here and in *Ratzlaf*, the *mens rea* standard of "willfully" is found in the penalty provision of the law, not in the substantive provision. The relevant section here says that the petitioner has committed a crime if he or she "willfully violates any other provision of this chapter." 18 U.S.C. § 924(a)(1)(D). In *Ratzlaf*, the relevant provision punishes any "person willfully violating this subchapter." 31 U.S.C. § 5322(a). As the Eighth Circuit has pointed out, "Because one cannot willfully

violate a statute without knowing what the statute prohibits, the Supreme Court (in *Ratzlaf*) required proof that petitioner intentionally violated a 'known legal duty' " (*United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) (emphasis in original), *cert. denied*, 117 S.Ct. 2452 (1997)). The nearly identical textual structure here should require the same result as that reached in *Ratzlaf*, where this Court decided that a petitioner could not be found guilty of willfully violating the antistructuring provisions of 31 U.S.C. § 5324 (as they then existed), unless he or she knew that money structuring was illegal and intentionally violated the statute.

ANALYSIS OF THE FIREARM STATUTE'S HISTORY

An analysis of the legislative history of the "Firearms Owners' Protection Act (FOPA)," we respectfully submit, firmly establishes Petitioner's contention that the statute's clear purpose was for the Courts to apply "willfully" as the violation of a known legal duty.

FOPA was passed in 1986 after seven years of effort by its congressional sponsors, and the National Rifle Association (*United States v. Hayden*, 64 F.3d 126 at 129 (3rd Cir. 1995); David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 *Cumb. L. Rev.* 585, 585, 610 (1987)) hereinafter "Hardy." It first passed in the Senate, as S. 49, after one day of debate, where it was voted upon without being referred to committee. (Hardy, *supra* at 588, 611-12, 620-21). Thus, there is no Senate Committee Report, nor was there a House/Senate Conference Report (Hardy, p. 625).

The House version of FOPA was blocked in committee by the then "liberal" Democratic House leadership until it was the subject of a discharge petition signed by a majority of the entire House² (Hardy, *supra* at 621-24). The leadership then reported a counter measure out of the Judiciary Committee. This bill, H.R. 4332, attempted to undo many key provisions of the Senate Bill, including its use of "willfully" as the level of intent required to secure a conviction for gun crimes, including the one at issue here (H.R. 4332, 99th Congress, 2d Session § 8(2); see Hardy, *supra* at 623 & n.206). H.R. 4332 was accompanied by House Report No. 99-495, which is the only committee report on any version of FOPA proposed in the 99th Congress. The House Report, although opposing the willfulness requirement, makes crystal clear that in adopting this standard, a conviction for selling guns without a license would require proof of the petitioner's "knowledge that such conduct requires a federal license, and a determination to violate that law" (House Report No. 99-495 at 11, reprinted in 1986 U.S. Code Cong. and Admin. News 1327, 1337).

As this Court has recognized in surveying legislative history, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . ." (*Garcia v. United States*, 469 U.S. 70, 76 (1984)). Simply put, "Committee Reports are 'more authoritative' than comments from the floor . . ." (*Id.*, quoting *Zuber v.*

² In the context of the powers wielded by the Speaker of the House and the leadership, the resort to a populist legislative device bespeaks a groundswell of House support willing to test the House leadership.

Allen, 396 U.S. 168, 187 (1969)). Here, the only committee reports that members had in front of them when considering FOPA in the 99th Congress stated clearly that "willfully" meant that a petitioner must know the law and intend to violate it.

During the floor debate in the House, members were also "repeatedly informed that knowledge of the law would be necessary for a criminal conviction" (*United States v. Rodriguez*, ___ F.3d ___, 1997 WL 797506, at *3 (5th Cir. 1997)).

On the House floor, the Judiciary Committee's proposed bill was defeated, and a bill including the "willfully" requirement was passed as a substitute (132 Cong. Rec. H1752-53 – daily edition April 9, 1986; Hardy, at 624-625). In the course of that debate, the sponsor of the Judiciary Committee's bill, Representative Hughes offered an amendment to change "willfully" to "knowingly." Rep. Hughes explained to his colleagues that the "willfully" standard was "most damaging" because it would require the prosecution "to show that the (gun) dealer was personally aware of . . . the law, and that he made a conscious decision to violate the law" (132 Cong. Rec. H1684 – daily edition April 9, 1986) (statement of Rep. Hughes). The House then voted 248-173 to retain the "willfully" language (132 Cong. Rec. H1699 – daily edition April 9, 1986).

Thus, the strict meaning of "willfully" was specifically put forth on the floor of the House, and the House intentionally voted to retain its use (*United States v. Rodriguez*, *supra*). Thus, the overwhelming weight of the reliable available evidence of what Congress intended,

and what its members well understood, is that by passing the "willfully" provision, they were requiring the Government to prove that a petitioner knew of the federal licensing requirement, and intentionally violated it (see *United States v. Hayden*, *supra*, 64 F.3d at 129-30). At the very least, "the legislative history is consistent with (the strict) definition" (*United States v. Hern*, 926 F.2d 764, 767 & n.6 (8th Cir. 1991)).

CONSTRUCTION OF "WILLFULLY" IN SIMILAR STATUTES

The opinion of the Second Circuit relied heavily upon its earlier decision in *United States v. Collins*,³ 957 F.2d 72, 76 (2d Cir. 1992), *cert. den.*, 504 U.S. 944 (1992). Its later holding in *United States v. Allah*, 130 F.3d 53, (2d Cir. 1997) follows an unfortunate Second Circuit pattern of statutory construction in misreading the legislative history.

It may sometimes be true that the term "willfully" has varying interpretations, as the late Justice Jackson observed in writing for the Court in *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364 87 L.Ed. 418 (1943) *rev'g* 128 F.2d 743 (2d Cir. 1942). It is, we respectfully submit,

³ In *Collins*, trial counsel did not contend that the Government was required to prove knowledge of licensure. As such, the appellate argument on appropriate *mens rea* was presented as a deficiency in the Trial Court's legal instruction under the plain error doctrine. Moreover, in *Collins*, the proof involved direct undercover sales to ATF agents. The Court held that the charge was error, but only harmless error in light of the powerful proof of *Collins*' guilt, applying *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991).

important to recall that Justice Jackson made this observation reversing a tax conviction previously affirmed by the Court of Appeals for the Second Circuit, and in attempting to apply two separate delphic criminal tax statutes – one of which made the willful failure to pay a tax when due a misdemeanor and the other, a willful attempt to defeat and evade the tax a felony. Justice Jackson did not have the benefit of a clearly expressed legislative intent and consistent uses of "willful" and "knowing" to distinguish the type of proof required to convict.

The question, however, is not limited to the bare limits of legislation, but rather, whether the clear Congressional intent is entitled to respect from the judicial branch.

The use of a willful mental state is not at all unusual when Congress recognizes the potential wide net of application and potential lack of notice to those who may find themselves the subject of a criminal prosecution (see e.g., *United States v. O'Hagan*, ___ U.S. ___, 117 S.Ct. 2199, 2214 (1997)).

Thus, when foreign policy concerns may be in conflict with free enterprise commercial endeavors, it is only those who willfully violate the ban on exportation of armaments found in 22 U.S.C. § 2778(c) who may be prosecuted (see *United States v. Golitscheck*, 808 F.2d 195, 202-203 (2d Cir. 1986) *per Newman, J.*; *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976)). Moreover, under the "Trading With the Enemy Act," 50 U.S.C. App. § 5, a willful *mens rea* is required, to protect

against unfair prosecutions of uninformed petitioners (see *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983)).

In times of war and national emergency, the Military Selective Service Act (50 U.S.C. App. 462) nonetheless still carefully limited resort to criminal penalties to those proven to have intentionally violated a *known* legal duty to register for service in the armed forces (*United States v. Kerley*, 838 F.2d 932, 936 (7th Cir. 1988 per Posner, J.) accord *United States v. Schmucker*, 815 F.2d 413, 421 (6th Cir. 1987).

In the field of labor relations, the use of a willful mental state has likewise been utilized by legislative draftsmen. Thus, to criminally violate the Railway Labor Act (45 U.S.C. § 152) has been held to require conduct which is voluntary and an intentional violation or a *known* legal duty (see *United States v. Winston*, 558 F.2d 105, 108 (2d Cir. 1977)). So too for violations of federal aviation regulations (*United States v. Eastern Airlines*, 192 F.Supp. 187, 192 (S.D.Fla. 1961)).

When Congress legislated in the "hot button" civil rights area, proof of a specific intent to violate a victim's constitutional right was still required (*United States v. North*, 910 F.2d 843, 884-888 (D.C. Cir. 1990)).

When Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. 2252), the need for a significant scienter requirement was also recognized, due to the constitutional free speech implications (see *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)). Moreover, Chief Judge Rehnquist's constitutionally sensitive and well-reasoned opinion, broadly embraced the need to broadly

apply scienter, even where the applicable statute on its face may be silent.

More recently, environmental concerns are in the forefront of public attention, and in inevitable conflict with business interests. The interpretation of the "Clean Water Act" and the "Resource Conservation and Recovery Act" (see 33 U.S.C. 1311(a) and 1319(c)(2)(A)) also raises significant concerns about the mental state required for criminal violations (see e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995), *cert. den.*, ___U.S.____, 116 S.Ct. 773 (1996); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. den.*, 513 U.S. 1128 (1995) (scienter requirement) (inapplicable to each element of offense) but cf. *United States v. Ahmad*, 101 F.2d 386 (5th Cir. 1996)).

THE CIRCUIT'S APPROACH TO FOIPA

The Second Circuit's holding here, and subsequently in *United States v. Allah*, 130 F.3d 33 (2d Cir. 1997), gives voice to an *ad hoc* approach to criminal statutory interpretation which views firearms as not eligible for a true "willfull" *mens rea* because they are inherently dangerous, and subject to regulation.⁴ Moreover, the Second Circuit

⁴ This is certainly at variance with traditional role of the Federal Government in firearms control (see, e.g., *Printz v. United States*, ___U.S.____, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997)), which did not even begin until enactment of the Omnibus Crime Control and Safe Streets Act of 1968 in response to an explosion of urban street violence and mob rioting bordering upon civil insurrection (see *Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 919-920, 63 L.Ed.2d 198 (1980)).

revealed its true agenda in *Allah* by suggesting that the Congress did not need to enact a willful mental state.

This approach is clearly wrong. The proper *mens rea* to be applied here is that intended by Congress, and this simple rule is not affected by the fact that the subject matter of this prosecution was guns, rather than money (see, e.g., *Bailey v. United States*, 116 S.Ct. 501, 506-07 (1995)). Even if the Second Circuit believed that Congress did not "need" to add a strict willfully requirement to the firearms law, the issue is solely whether Congress decided that this limitation on some federal firearms prosecutions was desirable and then included it in the Firearms Owners' Protection Act. The record is unequivocal that this is just what Congress did.

Moreover, while this is a firearms case, guns are not so inherently evil that a Court is thereby authorized to ignore the intent of Congress. Any argument to this effect was surely laid to rest by *Staples v. United States*, 114 S.Ct. 1793 (1994), where this Court stated:

Neither, in our view, can all guns be compared to hand grenades. . . . [T]he fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* (401 U.S. 601 (1971)) or to the selling of dangerous drugs that we considered in *Balint* (258 U.S. 250 (1922)).

Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and

blameless conduct. Roughly 50 per cent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

114 S.Ct. at 1799, 1801.

In contrast to the holding below, Judge Rovner's opinion for a unanimous Court in *United States v. Obiechie*, 38 F.3d 309, 311-316 (7th Cir. 1994) provides, we respectfully submit, the legislatively accurate and judicially appropriate analysis of the statute in question and its application by holding that willfulness in the context of an 18 U.S.C. § 922(a)(1)(A) prosecution means proof that the petitioner is aware that a firearms dealer's license is required (accord *United States v. Hayden*, 64 F.3d 126, 128-132 (3d Cir. 1995); *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-554 (11th Cir. 1996); and most recently in *United States v. Rodriguez*, ___ F.3d ___, 1997 WL 797506 (5th Cir. 1997).

Thus, the majority of well-reasoned Circuit authority has recognized that the 1986 statutory amendments, for good or ill, reflected a clear and unequivocal legislative judgment it would not authorize prosecutions of unintentional violators of the firearms statutes, and clearly manifests a congressional intent that, only *those who knew and acted contrary* to law would face federal prosecution for firearms transactions without the appropriate license (see, e.g., *United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988), accord *United States v. Obiechie*, *supra*, p. 312).

THE APPLICATION OF THE RULE OF LENITY

In light of the analysis above, it is clear that "willfully" in FOPA means the intentional violation of a known legal duty. If this Court were to conclude, notwithstanding contrary indications that the meaning of "willfully" in § 924(a)(1)(D) is ambiguous, the rule of lenity "provides a time-honored interpretive guideline when the congressional purpose is unclear (*Liparota v. United States*, 471 U.S. 419, 427 (1985)). This Court has long recognized that, where legislative ambiguity is perceived in a criminal statute, the rule of lenity requires that the Court "resolve any doubt in favor of the petitioner" (*Ratzlaf*, 114 S.Ct. at 662-63; accord *Reno v. Koray*, 515 U.S. 50, 115 S.Ct. 2021, 2029 (1995); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *United States v. Bass*, 404 U.S. 336, 347-50 (1971); *Toussie v. United States*, 397 U.S. 112, 122 (1970)). Since lenity principles "demand resolution of ambiguities in criminal statutes in favor of the petitioner," *Hughey*, 495 U.S. at 422 (1990), Petitioner should prevail for this reason as well.

THE APPLICATION TO THE FACTS OF THIS CASE

The final, and not, we respectfully submit, insignificant aspect, of the Court's review requires a consideration of the Petitioner – his age, background, and level of sophistication in assessing whether he, and other lay individuals, could reasonably be aware of the existence of the federal licensing statute.

Importantly, as previously noted, the purchase of firearms in Ohio does not require permission of a state licensing authority. Proof of identity and age coupled with an informational form suffice. Accordingly, in the context of the transactions charged herein there would hardly be anything to place an individual on notice that at some unquantified later time, should he sell firearms he would run afoul of a dealer's license requirement.

Beyond the lack of notice that a dealer's permit was required, it is important to recall that individuals who possess, barter, and occasionally sell firearms, are usually not surrounded by a battalion of lawyers⁵ to advise them on the requirements of possessing or transferring their firearms. Simply put, in an age of big government's increasing intrusion into the previously purely local actions of ordinary people, to federally penalize for lack of knowledge is a cruel targeting of those least able to keep up.

Finally, in what can only be characterized as a cruel David and Goliath matchup, the Government has selected for prosecution a veritable teenager who was learning impaired and never got beyond the ninth grade.

While it may be assumed that a gun club member has access to information of the Dealer's licensure requirement, or that a sports shop owner can be presumed to have such knowledge, it would be cruel to target the

⁵ This is contrasted to circumstances in the tax, import/export, pharmaceutical and environmental areas where frequently institutional clients maintain legal departments or staff just to monitor compliance (see, e.g., *United States v. Wilson*, ___ F.3d ___, 1997 WL 785530 (4th Cir. 1997)).

young and slow of mind and hold them to *know* of the existence of an obscure statute.

Proper enforcement requires recognition that legislation to be effective must be known and applied fairly. To sentence a mentally deficient teenager to a federal jail because he did not know he needed a firearms dealer's license punishes a member of vulnerable and uninformed class of individuals. It surely suggests how a little-known statute can inadvertently become a trap for the unwise, unsophisticated, and unwary.

We urge this Court to reverse this conviction, whether as a function of statutory construction (*e.g.*, *United States v. Obiechie*, *supra*; or as a function of the application of the doctrine of lenity (*United States v. McNally*, 483 U.S. 350, 359-360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987))).

II

THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT THE GOVERNMENT MUST PROVE THE PETITIONER'S KNOWLEDGE OF HIS OBLIGATION TO POSSESS A FEDERAL FIREARMS DEALER'S LICENSE DIMINISHED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED PETITIONER OF A FAIR TRIAL

Perhaps no portion of the trial Judge's jury charge is more important to be accurate, balanced and fair, than its instructions on the requirement of the intent which the jury must find before a conviction can occur. Intent is always a jury question (*McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307, 324 (1991)).

As argued in Point I, the crucial element of intent was the key issue in this case. Thus, if a properly instructed jury believed that Petitioner acted out of ignorance, foolishness or stupidity, the broad "line in the sand" separating the unknowledgeable accused from the knowledgeable and unscrupulous arms merchant is as apparent as it is real.

The jury, however, that decided Petitioner's case acted under the belief, as directed by Judge Trager's clear instructions, that knowledge of the licensing requirement was simply not a question which it was required to consider, in determining guilt (J.A. 18-19). We must, of necessity, presume that the jury followed the Court's instruction (*Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Where juries are erroneously instructed on the issue of intent, the unfair prejudice to the accused requires reversal (*see Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 39 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed. 2854 (1978)).

While concededly application of the "harmless error" rule may provide some attraction in a given case (*Rose v. Clark*, 478 U.S. 570, 580-582, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)) even when the charge in the instant case is considered in its entirety (*Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)) it should have no application here. This is not a situation, such as the Court confronted last term in *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544 L.Ed.2d 718 (1997), where relying upon prior legal authority, trial counsel did not request an instruction on the element of materiality, believing it to be a question of law for the Court, and not a factual

question requiring jury consideration. Here, the issue went directly to the issue of intent.

Nor, we respectfully submit, is it a situation such as in *Rogers v. United States*, 94 F.3d 1519 (11th Cir. 1996), cert. granted, ___ U.S. ___, 65 U.S.L.W. 3777, cert. *dism'd*, ___ U.S. ___, 62 Cr. L. 2047 (1998) (which was orally argued on November 5, 1997) where Petitioner admitted the essential element of the offense about which the Trial Court neglected to instruct the jury (*see* 62 Cr. L. Rptr. 3075-3078 (1997)). A verdict based upon a finding of the incorrect and contested mental state, cannot fairly be permitted to stand (*Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969 (1983); *Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 357 (1972)).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE
REVERSED AND THE CASE REMANDED TO THE
COURT OF APPEALS WITH DIRECTION TO VACATE
THE CONVICTION OR ORDER A NEW TRIAL

Dated: New York, New York
January 22, 1998

Respectfully submitted,

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2. 18 U.S.C. 924 (a)(1)(D)	1a

STATUTES INVOLVED

18 U.S.C. § 922(a)(1)(A) states:

Unlawful acts

(a)(1)(A) "It shall be unlawful for any person – except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business or importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; "

18 U.S.C. § 924(a)(1)(D) states:

Except as otherwise provided in this subsection-
. . . Whoever

(D) Willfully violates any other provision of this Chapter shall be fined under this title, imprisoned not more than five years or both. . . .

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Supreme Court, U.S.
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No. 96-8422

In the Supreme Court of the United States

OCTOBER TERM, 1997

SILASSE BRYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a conviction for willfully violating 18 U.S.C. 922(a)(1)(A), which prohibits dealing in firearms without a federal license, requires the jury to find that the defendant had specific knowledge of the federal firearms licensing requirement he violated, or whether it is sufficient that the jury find that he had general knowledge that his conduct was unlawful.

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OPINION BELOW

The opinion of the court of appeals (J.A. 20-26) is reported at 122 F.3d 90.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1997. The petition for a writ of certiorari was filed on March 31, 1997. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent parts of Sections 921(a)(21)(C), 922(a)(1)(A), and 924(a)(1) of Title 18 of the United States Code are reprinted in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of willfully dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1)(A) and 924(a)(1)(D), and one count of conspiracy to deal in firearms without a license, in violation of 18 U.S.C. 371. J.A. 21. Petitioner was sentenced to 57 months' imprisonment, to be followed by three years' supervised release. *Ibid.* The court of appeals affirmed. J.A. 26.

1. a. In November 1992, petitioner traveled from New York City to Columbus, Ohio, to stay at the home of Deloras Tillman. Tr. 13-15. Petitioner's brother, who was an acquaintance of Tillman's, had asked Tillman if petitioner could come and stay with her, and Tillman had agreed. Tr. 10-11. Petitioner traveled to Columbus to "make some money." Tr. 11. At that time, Ms. Tillman and others were selling up to one kilogram of cocaine per week from Ms. Tillman's home. Tr. 6-8.

After petitioner's arrival, he asked Tillman to purchase some guns for him, ostensibly because he lacked the picture identification necessary to make firearms purchases in Ohio. Tr. 16-17. Tillman agreed, and petitioner went with her to a Columbus gun store, gave her approximately \$300, and selected two Lorcin .380 pistols for her to purchase. Tr. 18-19, 24-25. Tillman purchased the two pistols, using an identification card that contained an incorrect name, address, and social security number. Tr. 20-21. Tillman used the same false name and address when filling out a form at the gun store. Tr. 23-24. In addition, Tillman falsely claimed on the form that she had

never been convicted of a felony. Tr. 24. In fact, Tillman had been convicted in 1990 for felony theft. Tr. 6, 24.

After they left the gun store, Tillman immediately gave the pistols to petitioner. Tr. 25. Petitioner placed the guns in a locked room in Tillman's residence and left for New York City the next day. Tr. 26-27. When he departed, petitioner was carrying a duffel bag. Tr. 28. Tillman never saw the pistols again. *Ibid.* Petitioner did not pay Tillman a fee for purchasing the pistols. Tr. 34.

Although petitioner returned to stay with Tillman approximately five more times, he did not ask her to buy guns for him again, because he knew that she was no longer willing to do so. Tr. 29, 31. Petitioner did ask two of Tillman's acquaintances to make such purchases, but they refused. Tr. 30-31. Petitioner at one point explained to Tillman that he was taking guns to New York, to sell them for a profit. Tr. 30. Petitioner also told Tillman that he was buying guns in Ohio because it was unlawful to buy guns in New York without a license. *Ibid.*

b. On February 10, 1993, petitioner was introduced to one of Tillman's neighbors, Nicole Bradley. Tr. 75, 81, 84, 102. Petitioner, whom Bradley knew only as "Uzi," asked Bradley whether she would purchase guns for himself and another man whom Bradley knew only as "Oz." Tr. 82. When she assented, the two drove with her to a Columbus gun store, where petitioner gave her money and instructed her to purchase three Lorcin .380 pistols that he selected. Tr. 81-86. In filling out a form in connection with the purchase, Bradley falsely stated that she was not unlawfully using controlled substances. Tr. 85. In fact, Bradley was addicted to crack cocaine. Tr. 78.

Later that same day, Bradley purchased two more Lorcin .380 pistols for petitioner at a second gun store. Tr. 86-87. Bradley gave all five of the pistols she purchased to petitioner, and never saw them again. Tr. 86, 88-89. Petitioner paid Bradley \$40 for purchasing the guns. Tr. 88-89.

The next day, petitioner's accomplice, "Oz," asked Bradley to purchase another weapon. Tr. 89. Bradley did so, once again purchasing a Lorcin .380 pistol. Tr. 89-91. Although petitioner did not accompany Bradley when she bought that pistol, he subsequently paid her an unspecified amount for purchasing it. Tr. 92.

Two weeks later, on February 25, 1993, petitioner asked Bradley to purchase additional weapons. Tr. 92, 94-96. Because she had already purchased so many guns for petitioner, Bradley asked petitioner what he was doing with the guns. Tr. 92. Petitioner explained that the guns were being taken to New York, where they were sold for \$300. *Ibid.* Bradley asked petitioner if she would get in trouble for purchasing the guns for him, but petitioner assured Bradley that the serial numbers would be filed off the guns, so that they could not be traced back to her. Tr. 93. Bradley agreed to buy additional guns for petitioner, and bought four Lorcin .380 pistols at two different gun stores on that day. Tr. 93-97. Petitioner paid Bradley \$40 or \$50 for buying the guns. Tr. 97.

Finally, on the next day, Bradley bought two more Lorcin .380 pistols for petitioner. Tr. 98-100. Petitioner paid her \$40 or \$60 for making the purchase. Tr. 100. Bradley made no further purchases for petitioner. *Ibid.*

c. At least six of the pistols that Tillman and Bradley bought for petitioner were subsequently recovered by the police in New York City. Tr. 147-

149, 152, 156, 165, 209. The weapons were traced back to the purchasers and, ultimately, to petitioner. Tr. 171. Petitioner was arrested and subsequently confessed that he had enlisted the assistance of several women in Ohio to purchase pistols for him; that he paid those women \$50-75 dollars for buying the pistols; that he and accomplices had transported the pistols to New York for resale; and that he had sold the pistols at "weed spots," or "marijuana locations," in his Brooklyn neighborhood, charging \$500 for each pistol. Tr. 180-184.

Records from the Bureau of Alcohol, Tobacco and Firearms established that petitioner had not been issued a federal license to deal in firearms. Tr. 185-187.

2. Petitioner was charged with violating 18 U.S.C. 922(a)(1)(A), which forbids dealing in firearms by anyone other than a licensed dealer. Under 18 U.S.C. 924(a)(1)(D), anyone who "willfully" violates certain provisions, including Section 922(a)(1)(A), is subject to fine and imprisonment.

Petitioner asked the trial court to instruct the jury that it could find petitioner guilty only if it found that "with the actual knowledge of the federal firearms licensing laws [petitioner] acted in knowing and intentional violation of them." J.A. 17. Petitioner also requested that the jury be instructed that it could return a guilty verdict only if it found that petitioner "acted with the knowledge that it was unlawful to engage in the business of firearms distribution lawfully purchased by a legally permissible transferee or gun purchaser." *Ibid.*

The district court declined to give the requested instructions. J.A. 18. Rather, it instructed the jury that:

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

J.A. 18-19. Further, with respect to the willfulness element of the offense of dealing in firearms without a license, the trial court instructed:

In this case, the government is not required to prove that [petitioner] knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that [petitioner] acted willfully. In order to satisfy this element, the government must prove that [petitioner] acted knowingly and purposely and that [petitioner] intended to commit an act which the law forbids.

J.A. 19.

3. Petitioner appealed, arguing *inter alia* that the district court erred by refusing to instruct the jury that it could find him guilty only if it found that he was actually aware that federal law required him to have a license. Pet. C.A. Br. 25. Relying on its earlier decisions in *United States v. Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 504 U.S. 944 (1992), and *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), the court of appeals affirmed. J.A. 21-22. As the court explained, its earlier cases had rejected the contention that a conviction for unlawful dealing in firearms requires proof that the "defendant had specific knowledge of the statute he is accused of violating." J.A. 21 (quot-

ing *Ali*, 68 F.3d at 1473). Rather, the court explained, what is required is proof that "the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." J.A. 21 (quoting *Collins*, 957 F.2d at 76). See also *United States v. Allah*, 130 F.3d 33, 37-41 (2d Cir. 1997) (*Collins* requires proof that "the defendant knew generally that his conduct was unlawful"), petitions for cert. pending, Nos. 97-6915 & 97-7418. Concluding that there was ample such evidence in the present case, the court of appeals affirmed. J.A. 22-23.

4. This Court granted certiorari limited to the questions whether a conviction for willfully dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1)(A), requires proof that the defendant had actual knowledge of the federal firearms licensing requirement, and whether the district court erred by refusing to so instruct the jury. J.A. 27, *Bryan v. United States*, 118 S. Ct. 622 (1997); Pet. i.¹

SUMMARY OF ARGUMENT

Section 924(a)(1)(D) of Title 18 makes it an offense when a person "willfully violates" federal firearms law by, *inter alia*, engaging in the business of dealing in firearms without a license. The willfulness element requires proof that the defendant was generally aware that his conduct was unlawful. It does not,

¹ In his brief on the merits, petitioner states that the first issue presented is whether there was sufficient proof of willfulness to support the conviction in this particular case. Pet. Br. i. That question was not presented in the petition, and we do not understand it to be "fairly included" within the issues upon which certiorari was granted. Sup. Ct. R. 14.1(a). Moreover, petitioner does not discuss the question in his brief. We therefore do not address the point.

however, require proof that the defendant had knowledge of the specific provision of federal law—the licensing requirement—that he was violating.

The word “willfully,” as this Court has often noted, draws its meaning from its statutory context. Consistent with the general norm that ignorance of the law is not a defense, the word “willfully” ordinarily does not require any proof that the defendant had knowledge of the law or that his actions were unlawful. In some settings, it means simply that the defendant acted intentionally, voluntarily, or deliberately. See, e.g., *Browder v. United States*, 312 U.S. 335 (1941). More often, the Court has required proof of bad purpose or evil motive to show willfulness in a criminal case—again, however, without requiring proof of knowledge of the law. See *Screws v. United States*, 325 U.S. 91 (1945). Only in two contexts has the Court held that the willfulness element of a criminal statute requires knowledge of illegality. See *Cheek v. United States*, 498 U.S. 192 (1991) (criminal tax laws); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (currency structuring laws). Those cases do not hold, however, that willfulness generally requires knowledge of specific legal duties.

The structure and purpose of federal firearms law demonstrate that a defendant’s knowledge or awareness of the general unlawfulness of his conduct satisfies the willfulness requirement, and that a showing of specific knowledge of federal requirements is not required. Because certain violations of federal firearms law may be punished criminally upon proof of a “knowing” violation, see 18 U.S.C. 924(a)(1)(A), (B), and (C), the willfulness requirement in Section 924(a)(1)(D) demands more than simply that the defendant was aware of his actions. But it is

hardly necessary to jump to the highest mental state known to the law—knowledge of the specific provision of law being violated—in order to give “willfully” a distinctive meaning. A requirement that the defendant have general knowledge of the unlawfulness of his conduct is sufficient to meet that objective.

There is no risk that, absent a requirement that the government establish a defendant’s specific knowledge of the law, the criminal prohibition here might ensnare the innocent. There is a long history of regulation of commerce in firearms, and the federal firearms-dealers licensing requirement is limited to dealers who regularly engage in the business of selling firearms for a profit. Thus, the statute does not sweep in the casual trader or law-abiding gun owner. By contrast, imposing the requirement on the government to show specific knowledge of federal licensing law could frustrate law enforcement efforts to combat the unlawful firearms trade. Underground firearms dealers—who often supply guns to drug dealers, violent criminals, or others who cannot lawfully acquire them—are not likely to consult federal law before engaging in their trade, or even to know whether it is federal, state, or local law they are violating. Yet such dealers are generally aware (as revealed by actions such as using straw purchasers or filing off serial numbers) that their actions are illicit. Neither the structure of Section 924 and its related provisions; cases addressing “willfully” in other federal statutes; the legislative history of the provisions at issue; nor the rule of lenity justifies a construction of “willfully” that would immunize such clandestine dealers from prosecution.

Under a proper understanding of the willfulness requirement, the jury instructions in this case were

sufficient. Those instructions required the jury to find, before returning a verdict of guilty, that petitioner acted "intentionally and purposely and with the intent to do something the law forbids, that is with the bad purpose to disobey or to disregard the law." The instructions also informed the jury that it was not required to find that petitioner was "aware of the specific law or rule" he violated, that he "knew that a license was required," or that he "knew that he was breaking the law" (*i.e.*, the specific licensing law at issue). Taken as a whole, those instructions protected petitioner against conviction unless the jury concluded that he had general knowledge that he was violating the law, but made clear that he need not be shown to have specific knowledge of federal firearms licensing law.

ARGUMENT

A DEFENDANT IS GUILTY OF WILLFULLY VIOLATING FEDERAL FIREARMS LAW BY ENGAGING IN UNLICENSED FIREARMS DEALING WHEN HE HAS GENERAL KNOWLEDGE THAT HIS CONDUCT IS UNLAWFUL, EVEN IF HE LACKS SPECIFIC KNOWLEDGE OF FEDERAL LICENSING REQUIREMENTS

Section 922(a)(1)(A) of Title 18, enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, makes it unlawful for any person except a licensed importer, manufacturer, or dealer "to engage in the business of importing, manufacturing, or dealing in firearms." A defendant who "willfully violates" that provision by dealing in firearms without a license commits a criminal offense. 18 U.S.C. 924(a)(1)(D).

The issue in this case is whether, to establish that a defendant willfully dealt in firearms without a license, the government is required to prove that the defendant had specific knowledge of the federal licensing requirement, or whether instead it suffices for the government to prove that the defendant acted with a general knowledge or awareness that his conduct was unlawful. We submit that the requisite mental element is satisfied by proof that the defendant acted with a general knowledge that his conduct was unlawful. That conclusion is supported by the background principle that ignorance of the law is not a defense, by this Court's cases interpreting the term "willfully" in other contexts, and by the structure, purpose, and legislative history of Sections 922(a)(1)(A) and 924(a)(1)(D).²

² The Second Circuit has held that a conviction for dealing in firearms without a license requires proof "that the defendant knew generally that his conduct was unlawful." *United States v. Allah*, 130 F.3d 33, 38 (1997), petitions for cert. pending, Nos. 97-6915 & 97-7418. The First Circuit agrees. See *United States v. Andrade*, No. 96-2309, 1998 WL 32345, at *4-6 (Feb. 3, 1998) ("Nothing in the traditional willfulness instruction, nor in its underlying purpose, requires that the defendant possess specific knowledge of the statutory provision that makes his conduct unlawful."). One court of appeals has held, to the contrary, that the government is required to prove that the defendant had specific knowledge of the licensing requirement. See *United States v. Sanchez-Corcino*, 85 F.3d 549, 553-554 (11th Cir. 1996). One other court of appeals has indicated that the government is required to prove knowledge of illegality, without clearly indicating whether specific knowledge of the licensing requirement, as opposed to general knowledge of illegality, is required. See *United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994) (requiring proof that the defendant acted with "knowledge of the law").

A. Proof Of Willfulness Does Not Normally Require Proof Of Specific Knowledge Of The Law

This Court has repeatedly recognized that “[w]illful” * * * is a ‘word of many meanings’ and ‘its construction [is] often . . . influenced by its context.’” *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). In defining the term, however, the Court has paid heed to “the venerable principle that ignorance of the law generally is no defense to a criminal charge.” *Ratzlaf*, 510 U.S. at 149. See also *Cheek v. United States*, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system[,]” and the Court has applied that rule “in numerous cases construing criminal statutes.”) (citing cases). Thus, although the Court’s cases have defined the term “willfully” in a variety of different ways, those cases make clear

Three courts of appeals have considered the proper interpretation of the term “willfully” for purposes of other violations of the Gun Control Act that are governed by Section 924(a)(1)(D)’s willfulness requirement. All three require proof that a defendant was aware that his conduct was unlawful, but the courts appear to vary with respect to the degree of specificity of knowledge they require. See *United States v. Rodriguez*, 132 F.3d 208, 210-212 (5th Cir. 1997) (unlicensed sale of firearms to an out-of-state resident, in violation of 18 U.S.C. 922(a)(5)); *United States v. Hayden*, 64 F.3d 126, 130, 133 (3d Cir. 1995) (receipt of a firearm while under felony indictment, in violation of 18 U.S.C. 922(n)); *United States v. Hern*, 926 F.2d 764, 767 (8th Cir. 1991) (failure to keep proper records, in violation of 18 U.S.C. 922(b)(5), and conspiracy to sell firearms to nonresidents, in violation of 18 U.S.C. 371, 922(b)(3)). In our view, a single definition of “willfully” should govern all prosecutions under Section 924(a)(1)(D).

that proof of willfulness does not normally require proof of specific knowledge of the law.

1. In some contexts, the Court has held, “willful” means only “intentional” or “voluntary.” See, e.g., *Browder v. United States*, 312 U.S. 335, 340-342 (1941) (“the word ‘willful’ often denotes an intentional as distinguished from an accidental act”); *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243 (1938); cf. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (“In common usage the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’”); *Smith v. Wade*, 461 U.S. 30, 40 n.8 (1983).³

More frequently, at least in the context of criminal statutes, the Court has interpreted “willfully” to mean “with a ‘bad purpose.’” *Heikkinen v. United States*, 355 U.S. 273, 279 (1958). See also, e.g., *Screws v. United States*, 325 U.S. 91, 101 (1945) (opinion of Douglas, J.) (“‘when used in a criminal statute [“willful”] generally means an act done with a bad purpose’ * * * [or an] evil motive”) (quoting *Illinois Cent. R.R.*, 303 U.S. at 394); *United States v. Murdock*, 290

³ See also, e.g., *American Sur. Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) (“The word ‘willful,’ even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.”); Model Penal Code § 2.02(8) (1985) (“A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”); 1 E. Devitt et al., *Federal Jury Practice and Instructions* § 17.05, at 629 (4th ed. 1992) (defining “willfully” to mean “knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally”) (bracketed material omitted).

U.S. 389, 394 (1933) ("willfully" "generally means an act done with a bad purpose * * * [or] without justifiable excuse"); *Felton v. United States*, 96 U.S. 699, 702 (1878) ("Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wilfully," says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 'It is frequently understood' says Bishop, 'as signifying an evil intent without justifiable excuse.'") (citations omitted).

One way in which "evil intent" or "bad purpose" can be established is through proof that the defendant acted either with knowledge that his conduct was unlawful or with reckless disregard for the possibility that his conduct was unlawful. See, e.g., *Murdock*, 290 U.S. at 394-395 ("The word [*i.e.*, "willfully"] is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.") (citations omitted). The Court has relied upon this kind of "bad purpose" in interpreting the term "willfully" in a variety of contexts. For example, in *Screws*, the Court considered the meaning of the term in a provision, then codified at 18 U.S.C. 52,⁴ making it a crime for a person acting under color of law willfully to deprive another of a right secured by the Constitution or laws of the United States. 325 U.S. at 93 (opinion of Douglas, J.). In order to avoid concerns that the provision might otherwise be vague or indefinite, the plurality adopted a "narrow con-

⁴ The successor statute, which is substantially unchanged, is presently codified at 18 U.S.C. 242.

struction," holding that a defendant acts willfully within the meaning of the provision if he acts "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Id.* at 105. That standard does not require proof that a defendant had specific knowledge of the constitutional right at issue. *Id.* at 106 ("[t]he fact that the defendant[] may not have been thinking in constitutional terms is not material"). Rather, it is sufficient that the defendant acted in reckless disregard of specifically determined constitutional rights. *Id.* at 104. The analysis of the *Screws* plurality has been followed by the Court in subsequent decisions. See, e.g., *United States v. Lanier*, 117 S. Ct. 1219 (1997). See also, e.g., *United States v. Johnstone*, 107 F.3d 200, 209-210 (3d Cir. 1997) (upholding a defendant's conviction for violating Section 242, where the jury was instructed that it could convict "even if [it found] that [the defendant] had no real familiarity with the Constitution or with the particular constitutional right involved * * *, provided that [it found] that the defendant intended to accomplish that which the [C]onstitution forbids").⁵

⁵ Cf., e.g., *Illinois Cent. R.R.*, 303 U.S. at 243 ("willful" in some statutes "is employed to characterize conduct marked by careless disregard whether or not one has the right to act[.]" *i.e.*, actions by a person "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements") (internal quotation marks omitted). The Court has taken a similar approach to the term "willfully" when considering statutes authorizing the imposition of civil penalties for willful violations of certain employment statutes. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (under the Age Discrimination in Employment Act, conduct is willful if it reflects knowing or reckless disregard of the requirements of the statute; "this standard [is] consistent

Thus, even where the Court was concerned to adopt a narrow construction of the term "willfully," it required proof only that the defendant was reckless as to the illegality of his conduct, and specifically rejected the idea that proof of specific knowledge of the law was necessary to support a criminal conviction.

2. In certain contexts, however, the Court has interpreted the term "willfully" as requiring proof that the defendant acted with knowledge that his conduct was illegal. Criminal tax cases are the principal example of this construction. In those cases, the Court has interpreted the term to require proof of "a voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201 (quoting *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam)). The Court has emphasized, however, that this construction of "willfully" is a special and unusually stringent one, reflecting the concern that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 199-200. See also *id.* at 200 ("This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."); *United States v. Bishop*, 412 U.S. 346, 361 (1973) (the Court's interpretation of "willfully" in criminal tax cases "implements the pervasive intent of Congress to construct penalties that separate the

with the meaning of 'willful' in other civil and criminal statutes"); *McLaughlin*, 486 U.S. at 133 (same under the Fair Labor Standards Act); *TWA, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.").

The Court in one other context has interpreted the term "willfully" to require proof of knowledge of illegality. See *Ratzlaf*, *supra*. In *Ratzlaf*, the Court held that 31 U.S.C. 5322(a) (1988), which imposed penalties for "willfully violating," *inter alia*, the anti-structuring provision of 31 U.S.C. 5324(3) (1988), required proof that a defendant know that currency structuring is illegal.⁶ 510 U.S. at 149. The Court reached that conclusion for three principal reasons. First, unless "willfully" was construed in this way, it would have been rendered superfluous in light of Section 5324(3)'s requirement that a currency transaction be structured for the "purpose of evading" reporting requirements. *Id.* at 140. Second, the statute's "omnibus 'willfulness' requirement, when applied to other provisions in the same subchapter," had consistently been read to require "a 'specific intent to commit the crime,'" *id.* at 141, and the Court found "strong[] cause to construe a single formulation * * * the same way each time it is called into play," *id.* at 143 (citations and emphasis omitted). Finally, the Court, drawing an analogy to the tax laws, expressed the view that persons might have a variety of legitimate reasons for structuring transactions to avoid reporting requirements, just as they often structure their transactions to reduce or avoid the impact of the tax laws. *Id.* at 144-146. The Court

⁶ After the Court's decision in *Ratzlaf*, Congress amended the relevant provisions to provide that proof of knowledge of illegality is not required to establish a structuring offense. See Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, Tit. IV, § 411, 108 Stat. 2253.

therefore viewed a requirement of knowledge of illegality as an important way to ensure that such persons were not subject to prosecution. *Ibid.*

As the Court has since noted, its holding in *Ratzlaf* did not reflect a view that the term “willfully,” when used in a criminal statute, generally requires proof of knowledge of illegality. See *Bates v. United States*, 118 S. Ct. 285, 290 n.6 (1997) (“*Ratzlaf* decided only, in the particular statutory context of currency structuring, that knowledge of illegality was an element of 31 U.S.C. § 5322(a) as that provision was then framed.”). Rather, *Ratzlaf*, like the criminal tax cases, reflects the application of a narrow definition of the term “willfully,” which the Court viewed as required by unusual features of the statutory scheme there at issue.

B. Proof Of Specific Knowledge Of The Federal Licensing Requirement Is Not Required To Establish A Willful Violation Of Section 922(a)(1)(A)

An analysis of the structure and purpose of the Firearms Owners’ Protection Act (FOPA), which added the willfulness requirement at issue in this case to federal firearms law, establishes that proof of a defendant’s general knowledge of illegality is sufficient to show willfulness, and that proof that a defendant had specific knowledge of the federal licensing requirement is not required to support a conviction for willfully dealing in firearms without a license.

1. As originally enacted in 1968, neither Section 922(a)(1)(A) nor the other criminal prohibitions of the Gun Control Act contained a scienter requirement. Rather, in a separate sentencing provision applying to the Act as a whole, the Gun Control Act provided

that “[w]hoever violates any provision of this chapter * * * shall be fined not more than \$5,000, or imprisoned not more than five years, or both.” 82 Stat. 1223-1224 (18 U.S.C. 924(a) (1970)).

In 1986, Congress enacted the Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449. One provision of FOPA added a scienter requirement to the Gun Control Act’s penalty provision, to reflect Congress’s concern that the absence of such a requirement had resulted in “severe penalties for unintentional missteps.” *United States v. Collins*, 957 F.2d 72, 74 (2d Cir.) (quoting 132 Cong. Rec. 9590 (1986) (statement of Sen. Hatch)), cert. denied, 504 U.S. 944 (1992). Specifically, FOPA divided violations of the Gun Control Act into two classes and required proof of a knowing violation as to one class (18 U.S.C. 924(a)(1)(A), (B), and (C)) and proof of a willful violation as to the other (18 U.S.C. 924(a)(1)(D)). § 104(a)(1), 100 Stat. 456.⁷

It is well settled (and undisputed in this case) that, to prove a “knowing[]” violation within the meaning of Section 924(a)(1), the government need only show that the defendant had knowledge of the pertinent facts,

⁷ Generally, Congress required proof of knowing violations for the more self-evidently serious offenses in the Gun Control Act, including making false statements, possessing dangerous devices such as machine guns and semiautomatic assault weapons, transporting firearms with obliterated serial numbers, and importing firearms and ammunition. See 18 U.S.C. 924(a)(1)(A), (B), and (C). Conversely, Congress generally required proof of willful violations as to firearms offenses that are more regulatory in nature, such as the unlicensed manufacture, transportation, and dealing of firearms. See 18 U.S.C. 924(a)(1)(D). See generally, *e.g.*, *Andrade*, 1998 WL 32345, at *8 n.2.

and need not prove that the defendant knew his conduct to be unlawful. See, e.g., *United States v. Allah*, 130 F.3d 33, 39 (2d Cir. 1997), petitions for cert. pending, Nos. 97-6915 & 97-7418; *United States v. Hayden*, 64 F.3d 126, 130 (3d Cir. 1995); *United States v. Langley*, 62 F.3d 602, 606-607 (4th Cir. 1995) (en banc), cert. denied, 116 S. Ct. 797 (1996); *United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994); *United States v. Hern*, 926 F.2d 764, 767 n.5 (8th Cir. 1991); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988).⁸ It is also undisputed that, by applying the contrasting term "willfully" to certain violations of the Gun Control Act, Congress intended to require a higher level of scienter than applied to the offenses requiring a knowing violation. See, e.g., *Allah*, 130 F.3d at 39 (collecting cases); *United States v. Rodriguez*, 132 F.3d 208, 211 (5th Cir. 1997); *Obiechie*, 38 F.3d at 314.

Petitioner argues (Br. 13-14) that Section 924(a)(1)'s distinction between knowing and willful violations demonstrates that Congress intended the term "willfully" to require proof of a defendant's specific knowledge of the provision making his conduct unlawful. That is so, petitioner contends, because the latter interpretation of "willfully" is the only "reasonable" way to distinguish willful violations from

⁸ Proof of a knowing violation does not necessarily require proof that the defendant had knowledge of the pertinent facts on all elements of the violation. See, e.g., *Langley*, 62 F.3d at 605-607 (to prove a knowing violation of 18 U.S.C. 922(g)(1), which forbids convicted felons to possess firearms that have traveled in interstate commerce, the government need not prove that the defendant knew that the weapon had traveled in interstate commerce or that the defendant knew that his prior conviction was for a felony).

knowing ones. Pet. Br. 14 (quoting *Obiechie*, 38 F.3d at 315). The flaw in petitioner's argument is its unsupported assumption that the only way to give "willfully" a meaning that differs from "knowingly" is to interpret it as requiring a defendant's specific knowledge of the provision making his conduct illegal.⁹ In fact, all but one of the common interpretations of "willfully" impose a significantly different and more demanding scienter requirement than is required by "knowingly," see pp. 12-18, *supra*, and those interpretations accomplish that effect without imposing the unusually heightened requirement to show specific knowledge of particular provisions of law. Accord *Allah*, 130 F.3d at 39-40 (interpreting "willfully" as requiring proof of general knowledge of illegality gives the term a distinct and more demanding meaning than the term "knowingly," without insisting on specific knowledge of the law).

2. A conclusion that "willfully" requires proof that a defendant had knowledge of the specific provision of law that he violated would be warranted only in rare and unusual circumstances. Cf. pp. 16-18, *supra*. Such circumstances are not present here. To the contrary, an analysis of the context and purpose of the Gun Control Act demonstrates that there is no warrant for imposing so stringent a *mens rea* requirement, and that proof of general knowledge or awareness of illegality is sufficient.

The conduct at issue in this case involves commercial dealing in a dangerous commodity, i.e., firearms.

⁹ The courts of appeals that have adopted petitioner's interpretation of Section 924(a)(1)(D) have also relied heavily on that assumption. See, e.g., *Rodriguez*, 132 F.3d at 211; *Sanchez-Corcino*, 85 F.3d at 553-554.

Although the federal government has never generally regulated the private possession of firearms, it has closely regulated the sale of firearms, prohibiting all unlicensed dealing in them. See Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214. Congress's findings upon enactment of the immediate predecessor to the Gun Control Act made clear the problems that justified the need for pervasive regulation of dealing in firearms:

(a) The Congress hereby finds and declares—

(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly

dealt with, and effective State and local regulation of this traffic be made possible[.]

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 225. Similarly, a substantial number of the States and territories have imposed licensing requirements on dealing in firearms or have regulated the sale of firearms in other ways. See Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of Treasury, *Firearms State Laws and Published Ordinances* v-vi (20th ed. 1994) (listing 24 states and territories that regulate gun dealers and manufacturers).

In light of this longstanding and pervasive scheme of regulation, it can hardly be argued that unlicensed dealing in firearms is the sort of commercial activity that citizens might think is freely permissible without any legal constraint. There is therefore no basis for presuming that only an extraordinarily elevated level of scienter—demanding proof of knowledge of specific legal requirements—could afford adequate protection against surprise. See *Allah*, 130 F.3d at 40 (“[F]irearms are inherently dangerous devices that have long been subjected to regulation, including licensing requirements. * * * [T]here was no need to introduce a ‘willfully’ element to inform gun dealers that unlicensed dealing was unlawful.”). Cf. *United States v. Freed*, 401 U.S. 601, 609 (1971) (proof of knowledge of the registration law is not required in a prosecution for unlawful possession of unregistered hand grenades, because “one would hardly be surprised to learn that possession of hand grenades is not an innocent act”).

An individual subject to the unlicensed firearms-dealing prohibition is particularly likely to be aware

of the presence of a regulatory backdrop. The prescription applies only to those who engage in a "regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," and not to the casual or occasional seller. 18 U.S.C. 921(a)(21)(C). In this context, it is a fully sufficient protection against ensnaring the innocent that the government must prove that the defendant knew generally that his conduct was unlawful. See *United States v. Andrade*, No. 96-2309, 1998 WL 32345, at *5 (1st Cir. Feb. 3, 1998) ("Nothing indicates that Congress was concerned with protecting individuals who knew that their conduct was unlawful but might not be able to cite chapter and verse as to which precise provision made it so."). Of course, in this context, as in others, proof that the defendant consciously avoided discovering the illegality of his conduct would also satisfy the required mental state. Cf., e.g., *United States v. Farouil*, 124 F.3d 838, 843 (7th Cir. 1997). Cf. also *Turner v. United States*, 396 U.S. 398, 417 (1970).

This Court's decision in *Staples v. United States*, 511 U.S. 600 (1994), upon which petitioner relies (Br. 24), is not to the contrary. *Staples* held that, in a prosecution under 26 U.S.C. 5861(d), which prohibits unregistered possession of certain firearms, including machineguns, the government was obliged to prove that the defendant was aware that the weapon he possessed had the characteristics that made it a machinegun. 511 U.S. at 602. In reaching that conclusion, the Court emphasized that "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. That tradition, however, does not extend to the unlicensed business of dealing in firearms for profit. Moreover,

the Court in *Staples* required only that the government prove the defendant's knowledge of the facts; the Court did not cast doubt on its earlier holding in *Freed*, *supra*, that the government is not required to prove that the defendant was aware of the legal requirement that firearms must be registered. *Staples*, 511 U.S. at 609. See also *Rogers v. United States*, 118 S. Ct. 673, 675 (1998) (opinion of Stevens, J.) ("It is not, however, necessary to prove that the defendant knew that his possession was unlawful, or that the firearm was unregistered."). Nothing in *Staples* supports the conclusion that Section 924(a)(1)(D) should be read to require proof not just that a defendant who dealt in firearms without a license generally knew that his conduct was illegal, but also that he had specific knowledge of the federal licensing requirement.¹⁰

3. Requiring the government to prove that a defendant had specific knowledge of the provision making his conduct unlawful would significantly impede prosecutions for violations of the Gun Control Act. Direct proof of such knowledge will rarely be found. In some cases it will be possible for the government to introduce sufficient circumstantial evidence to per-

¹⁰ The willfulness requirement in Section 924(a)(1)(D) applies not only to dealing in firearms without a license, but also to a number of other provisions of the Gun Control Act. See, e.g., 18 U.S.C. 922(a)(2) (restricting interstate transport or shipping of firearms by licensed dealers); 18 U.S.C. 922(a)(3) (restricting out-of-state firearms purchases by persons without a federal license); 18 U.S.C. 922(n) (prohibiting interstate transport of firearms by persons under felony indictment); 18 U.S.C. 923 (imposing record-keeping requirements on licensed dealers). In these contexts, too, proof that the defendant acted with general knowledge that his conduct was illegal will suffice to insure that inadvertent or innocent violators are not subject to criminal penalties.

mit a jury to draw an inference that such knowledge was present. See, e.g., *Rodriguez*, 132 F.3d at 212-213 (proof that the defendant engaged in counter-surveillance, was uneasy about the sale at issue, and had experience with firearms permitted the jury to infer that the defendant knew that a license was required to sell firearms to out-of-state residents). Even where the circumstantial evidence is *sufficient* to support an inference of specific knowledge, however, there is no assurance that a given jury in fact would rely on such circumstantial evidence to find guilt beyond a reasonable doubt.

In some cases, moreover, proving a defendant's specific knowledge of the provision rendering his conduct illegal—even circumstantially—would be quite difficult. Clandestine firearms dealers are not likely to acquaint themselves with the specific requirements of federal law that they are violating, or even to know whether it is federal, state, or local law they are violating. Nor are they likely to admit to having engaged in such legal research even if they conducted it. Yet such dealers may purposefully act with awareness that their surreptitious sales are unlawful. Foreclosing conviction in such cases would substantially diminish the effectiveness of the gun dealer laws. See, e.g., *Andrade*, 1998 WL 32345, at *5 (“To impose such a requirement of detailed knowledge of the firearms statutes (to which few judges could pretend) would make an enforcement of the gun dealer laws very difficult. And the requirement goes well beyond what is needed to screen out an innocent who honestly thought his conduct was lawful.”).

4. Petitioner advances five principal arguments in support of his claim that the term “willfully” in Section 924(a)(1)(D) should be interpreted as requir-

ing proof of specific knowledge of the provision rendering a defendant's conduct illegal. The first—that any other interpretation of the term would fail to take account of Congress's intent in distinguishing willful from knowing violations—has already been addressed. See pp. 20-21, *supra*. Petitioner's remaining arguments are equally without merit.

a. First, there is no merit to petitioner's reliance (Br. 15-16) on 18 U.S.C. 922(a)(3). That subsection prohibits licensees from selling or delivering a firearm to any person who the licensee knows or has reasonable cause to believe does not reside in the state of the licensee's place of business, except where the sale involves a rifle or shotgun, the transaction is face to face, and the transaction fully complies with the law of both the seller's and buyer's state. The subsection further “presume[s] * * * in the absence of evidence to the contrary, [that the licensee] had actual knowledge of the State laws and published ordinances of both States.” Petitioner argues that that presumption demonstrates that proof of specific knowledge is generally required to prove a willful violation, because otherwise Congress would have had no need to establish the presumption.

Petitioner's argument confuses what is *sufficient* with what is *necessary*. By creating a presumption that gun dealers know the law in a particular context, Congress created a presumption that would, if unrebutted, be *sufficient* to establish that a violation was willful. But that does not suggest that Congress believed that such proof was *necessary* to establish a willful violation. To the contrary, the presumption created by Congress is entirely consistent with an interpretation of “willfully” as requiring proof of general knowledge of illegality. When “willfully”

is so interpreted, Congress's presumption simply serves, if un rebutted, to provide proof of willfulness in the requisite sense.

b. Petitioner (Br. 14) also cites 18 U.S.C. 923(d)(1)(C) and (D), which permit the denial or revocation of a firearm dealer's license upon a showing of a willful violation of the requirements of the Gun Control Act. According to petitioner (Br. 14-15 (citing cases)), when FOPA was enacted the lower courts had adopted a uniform interpretation of the term "willfully" as used in that provision, and Congress must be presumed to have adopted that interpretation of the term when it enacted FOPA. Petitioner's argument is incorrect.

First, a number of the cases upon which petitioner relies emphasize that the meaning of the term "willfully" depends on its particular statutory context, and expressly distinguish the definitions they adopt from the definition that might apply in a criminal context. See, e.g., *Prino v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979); *Lewin v. Blumenthal*, 590 F.2d 268, 268-269 (8th Cir. 1979); *Shyda v. Director, Bureau of Alcohol, Tobacco & Firearms*, 448 F. Supp. 409, 415 (M.D. Pa. 1977) ("In a civil context such as this, the definition of 'willfully' is dependent upon the specific statutes involved. * * * There is no requirement of bad purpose as might be imposed were the Court faced with determining the definition of willfulness in a criminal prosecution."). Second, rather than reflecting a clear consensus, the cases in fact reflect a variety of different formulations.¹¹

¹¹ See, e.g., *Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir. 1980) (as used in Section 923(d)(1)(C), "willfully" "does not require bad purpose or evil motive * * *". The Secre-

Third, although the varying definitions reflected in the cases are rather unclear, see note 11, *supra*, none of the cases adopts the definition petitioner argues for here: that a willful violation requires proof that the defendant had specific knowledge of the law and intentionally violated it. Fourth, we have located no suggestion in the extensive legislative history of FOPA that Congress intended to adopt any of the varying definitions of "willfully" articulated in the handful of cases that had defined the term for purposes of civil sanctions under Section 923(d)(1).

c. Petitioner relies (Br. 11, 16-17) on this Court's decisions in *Cheek* and *Ratzlaf*. That reliance is misplaced.

As we have explained, see pp. 16-17, *supra*, the unusually stringent willfulness requirement imposed in *Cheek* and the other criminal tax cases reflects the

tary need only prove that the petitioner knew of his legal obligation and purposefully disregarded or was plainly indifferent to the recordkeeping requirements[;]" a violation is willful "if a person 1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements") (internal quotation marks omitted); *Perri v. Department of Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (willfulness "is established when a dealer understands the requirements of the law, but knowingly fails to follow them or was indifferent to them"); *Prino*, 606 F.2d at 451 ("'[W]illful' means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, regardless of venal motive.") (internal quotation marks omitted); *Rich v. United States*, 383 F. Supp. 797, 800 (S.D. Ohio 1974) (the government must prove "purposeful, intentional conduct" rather than "mere negligence").

daunting complexity of the tax laws, and the concern that innocent citizens, attempting in good faith to comply with their tax obligations, not be criminally punished for inadvertent errors. The firearms statutes at issue in this case, however, are not remotely comparable to the tax code in complexity. Moreover, the conduct at issue in this case involves the highly regulated business of dealing in firearms, which are a dangerous commodity. In that context, interpreting "willfully" as requiring proof of general knowledge of illegality will fully protect "an innocent who honestly thought that his conduct was lawful." *Andrade*, 1998 WL 32345, at *5.

For similar reasons, this Court's decision in *Ratzlaf* does not support petitioner's claim here. *Ratzlaf*'s interpretation of the term "willfully" rests on three primary considerations: the need to avoid an interpretation of the term that would render it superfluous; the need to ensure that the term was given a consistent interpretation with respect to all of the various provisions to which it applied; and the concern that a narrower interpretation might sweep up innocent conduct. 510 U.S. at 141-146; see pp. 17-18, *supra*.

Those considerations are not present here. Because Section 922(a)(1)(A) flatly prohibits dealing in firearms without a license, making no reference to a requisite mental state, the term "willfully" in Section 924(a)(1)(D) would not be rendered superfluous no matter how it was interpreted. See *Andrade*, 1998 WL 32345, at *6; *Allah*, 130 F.3d at 39; *Hayden*, 64 F.3d at 131.¹² Nor would interpreting "willfully" as

¹² Petitioner points out one structural similarity between Section 924(a)(1)(D) and the statute at issue in *Ratzlaf*: each

requiring proof of general knowledge of illegality create concerns about the proper scope of Section 924(a)(1)(D) as it related to provisions other than the licensing requirement in Section 922(a)(1)(A). See note 10, *supra*. Finally, when "willfully" is interpreted to require proof of general knowledge of illegality, there is no risk of criminalizing innocent conduct.

In sum, the interpretation of "willfully" in the criminal tax cases and in *Ratzlaf* does not support petitioner's submission that proof of the defendant's knowledge of the specific provision he is violating is required to establish a willful violation of Section 922(a)(1)(A). Indeed, even in the criminal tax and structuring settings, where the Court determined that a showing of knowledge of the law is required to establish willfulness, it is not altogether clear that

sets out penalties for those who "willfully violate[]" one of a number of provisions. Pet. Br. 16-17. According to petitioner, that formulation necessarily implies that a defendant must have specific knowledge of the provision he is said to have "willfully violated." *Ibid*. This Court, however, has rejected that precise argument, albeit in the context of the phrase "knowingly violates any such regulation." See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 562 (1971) ("We * * * see no reason why the word 'regulations' should not be construed as a shorthand designation for specific acts or omissions which violate the Act. The Act, so viewed, does not signal an exception to the rule that ignorance of the law is no excuse."). Similarly here, Section 924(a)(1)(D)'s requirement of proof of a willful violation simply refers to conduct that violates a pertinent provision and is committed willfully, *i.e.*, with a general awareness of illegality. Cf. *Langley*, 62 F.3d at 605 ("it is highly likely that Congress used section 924(a) simply to avoid having to add 'willful' or 'knowing' into every subsection of section 922") (quoting *Sherbondy*, 865 F.2d at 1002).

the Court contemplated proof that the defendant is acquainted with the specific provision of law that he violated.¹³ Cf. 1 L. Sand et al., *Modern Federal*

¹³ The Court in *Pomponio* approved, as adequately defining "willfully" in a criminal tax case, instructions to the jury that the government was required to prove that the defendants acted "with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law" and "purposely intending to violate the law." 429 U.S. at 11 & n.2. See also *United States v. McGuire*, 79 F.3d 1396, 1405-1406 (in a criminal tax case, the district court properly instructed the jury that the government was required to prove that the defendant acted "with bad purpose either to disobey or disregard the law"), reheard en banc on other grounds, 99 F.3d 671 (5th Cir. 1996), cert. denied, 117 S. Ct. 2407 (1997). And the courts of appeals that have implemented *Ratzlaf* have adopted a variety of formulations that appear to fall short of the level of intent petitioner advocates here. See, e.g., *United States v. Dashney*, 117 F.3d 1197, 1201-1202 (10th Cir. 1997) (after *Ratzlaf*, affirming a structuring conviction under 31 U.S.C. 5322(a), where the jury was instructed that the government was required to prove that the defendant acted "with bad purpose to disobey or disregard the law"); *United States v. Hurley*, 63 F.3d 1, 16 (1st Cir. 1995) ("We think that the thrust of *Ratzlaf*'s willfulness requirement is met if persons engaged in depositing broken down amounts are generally conscious that their laundering operation is illegal, even if they do not know the precise requirements of the law."), cert. denied, 116 S. Ct. 1322 (1996); *United States v. Oreira*, 29 F.3d 185, 188 (5th Cir. 1994) (after *Ratzlaf*, it would be proper to instruct the jury in a structuring case that the government must prove that the defendant acted "with bad purpose either to disobey or disregard the law"); but see, e.g., *Peck v. United States*, 73 F.3d 1220, 1223-1227 (1995) (after *Ratzlaf*, it was error to refuse to instruct the jury that the government was required to prove that the defendant knew that structuring was a crime, and to instead instruct that the government was required to prove that the defendant acted

Jury Instructions ¶ 3A.01, at 3A-18 (1997) ("'Willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law.") (citing, *inter alia*, *Ratzlaf*, *supra*, and *Pomponio*, *supra*).

d. Finally, petitioner (Br. 20-23) and amicus NACDL (Br. 26) cite a number of lower-court cases that they claim interpret the terms "willfully" or "knowingly" in other statutes to require proof of specific knowledge of illegality. These cases do not support petitioner's claim in the present case. Because "willfully" takes its meaning from its context, *Ratzlaf*, 510 U.S. at 141, the mere fact that it is given one interpretation in one statute sheds no light on the question whether it should be given the same interpretation in a different one. Thus, it should not be surprising that there are numerous lower-court opinions interpreting "willfully" as not requiring proof of specific knowledge of the law, or, in some contexts, as not requiring proof of knowledge of the law at all. See, e.g., *United States v. Gabriel*, 125 F.3d 89, 99-102 (2d Cir. 1997) (proof of willfulness for purposes of 18 U.S.C. 2(b) (willfully causing another to commit unlawful act) does not require proof of knowledge of the law) (citing cases); *United States v. English*, 92 F.3d 909, 914-916 (9th Cir. 1996) (same as to 15 U.S.C. 77x (interstate securities fraud)); *United States v. Daughtry*, 48 F.3d 829, 831-833 (same as to 18 U.S.C. 1001 (false statements)), cert. granted, vacated, and remanded, 516 U.S. 984 (1995), adopted in pertinent part on remand, 91 F.3d 675, 675-676 (4th Cir. 1996);

with "bad purpose either to disobey or disregard the law"), on rehearing, 106 F.3d 450 (2d Cir. 1997).

United States v. Phillips, 19 F.3d 1565, 1576-1584 (11th Cir. 1994) (same as to 29 U.S.C. 186(d)(2) (Taft-Hartley Act) and 29 U.S.C. 1131 (ERISA)) (citing cases), cert. denied, 514 U.S. 1003 (1995). See also note 13, *supra*.¹⁴

C. The Legislative History Does Not Justify A Higher Mental State For Willfulness Than General Knowledge Of Illegality

Petitioner (Br. 17-20) and his amici (NACDL Br. 5-18; Gun Owners Foundation Br. 10-14) also rely heavily on the legislative history of FOPA. Because application of traditional tools of statutory construction is sufficient here, resort to that history is not necessary to a proper determination of the issue

¹⁴ Moreover, some of the cases upon which petitioner and his amicus rely reflect the mistaken assumption that the interpretation of "willfully" in the criminal tax cases and *Ratzlaf* is generally applicable, rather than being an unusual interpretation applied only in special circumstances. See, e.g., *United States v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995) (referring to "[t]he prevalent interpretation of 'willfully' to mean intentionally violating a law of whose existence the defendant was aware"), cert. denied, 518 U.S. 1072 (1996); *United States v. Frade*, 709 F.2d 1387, 1391 (11th Cir. 1983) (in criminal statutes, "willfully" "generally connotes a voluntary, intentional violation of a known legal duty") (quoting *Bishop*, 412 U.S. at 360). Finally, a number of the cases that petitioner cites speak of general knowledge of illegality, rather than supporting a requirement that the government prove a defendant's specific knowledge of the provision he is charged with violating. See, e.g., *United States v. North*, 910 F.2d 843, 884 (1990) (noting parties' agreement that 18 U.S.C. 2071(b) (prohibiting willful destruction of public documents) required proof "that [defendant] acted with knowledge that his conduct was unlawful"), on rehearing, 920 F.2d 940 (D.C. Cir.), cert. denied, 500 U.S. 940 (1991).

presented in this case. In any event, however, the legislative history undermines rather than supports petitioner's claim.

1. FOPA had its genesis in bills that were introduced in 1979 by Senator McClure in the Senate (S. 1862, 96th Cong., 1st Sess.), and Representative Volkmer in the House (H.R. 5225, 96th Cong., 1st Sess.), as an outgrowth of Senate hearings into what the bill's sponsors considered "overzealous" enforcement of the Gun Control Act of 1968. See H.R. Rep. No. 495, 99th Cong., 2d Sess. 3 (1986).

No action was taken on the bills, and Senator McClure reintroduced his bill in 1981, with changes not relevant here. S. 1030, 97th Cong., 1st Sess.; see S. Rep. No. 583, 98th Cong., 2d Sess. 2 (1984). That bill was favorably reported, with amendments, by the Senate Judiciary Committee in 1982, S. Rep. No. 476, 97th Cong., 2d Sess., but no action was taken by the full Senate. Senator McClure then reintroduced the identical bill in 1983. S. 914, 98th Cong., 1st Sess.; see S. Rep. No. 583, *supra*, at 2.

As first proposed, the bills required the government to prove that the defendant acted "willfully" as an element of all firearms offenses. For example, S. 1030, as introduced and as favorably reported by the Senate Judiciary Committee in 1982, would have simply amended Section 924(a) to add the word "willfully," so that the statute would read: "whoever willfully violates any provision of this chapter" is guilty of a felony. S. Rep. No. 476, *supra*, at 9. The 1982 Senate Report explained the intent behind this provision as follows:

[Section] 103(a) inserts the word "willfully" into the general penalty clause contained in 18 U.S.C.

924(a). The purpose is to require that penalties be imposed only for willful violations—those intentionally undertaken in violation of a known legal duty. *United States v. Bishop*, 412 U.S. 346 (1973); *Pomponio v. United States*, 429 U.S. 10 (1976). Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. Improper prosecutions under such conditions * * * were documented in hearings before the Committee * * *. This subsection is designed to guarantee against such practices. It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to “ease the prosecutor’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.” *Morissette v. United States*, 342 U.S. 246, 263 (1952).

S. Rep. No. 476, *supra*, at 22.

The Senate did not act on the bill in 1982. When the bill was reintroduced as S. 914 in the 98th Congress in 1983, it contained the same willfulness requirement. S. 914, *supra*, at 16. That provision, however, encountered substantial opposition from law enforcement interests. In particular, the Bureau of Alcohol, Tobacco and Firearms, presenting the position of the Reagan Administration, objected that the proposed willfulness requirement “will make it more difficult to successfully prosecute cases under the Act.” *The*

Federal Firearms Owner Protection Act: Hearings on S. 914 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 52 (1983); see also *id.* at 22, 38, 48; S. Rep. No. 583, *supra*, at 2-3, 20-21.

The bill was therefore revised in committee. The structure of Section 924(a) was changed to adopt the Administration’s recommendation that certain offenses should require proof of a knowing violation of the Act, while the remainder would require proof that the defendant acted willfully. In addition, the committee substantially altered its view of the proper definition of the term “willfully.” The Senate Report accompanying the bill explained these developments:

Paragraph (1) of Section 104 makes a major change in 18 U.S.C. 924(a) by requiring for the first time the proof of criminal states of mind with respect to all of the activities proscribed in Chapter 44. Under existing law, * * * all violations constitute felonies. While some activities proscribed in Chapter 44 contain[] a criminal state of mind, many do not. As a result, persons can be subject to prosecution and harsh penalties for what are essentially technical violations of a regulatory scheme. * * *

As introduced, S. 914 would have required the prosecution to prove beyond a reasonable doubt that any offense under Chapter 44 had been committed “willfully.” The purpose of that change was to avoid prosecutions in cases where, for instance, a licensee carelessly committed a technical recordkeeping violation or other minor, inadvertent infraction. However, the Committee was receptive to concerns expressed by the Administration that requiring a “willful” state of mind in

some instances could pose legitimate law enforcement problems.

For this reason, the Committee amendment specifies a "knowing" state of mind with respect to offenses that involve the greatest moral turpitude and danger from a justified law enforcement standpoint. Thus, proposed Sections 924(a) (1) through (4) provide for criminal penalties where the offender knowingly commits specified offenses. Otherwise, under proposed 18 U.S.C. 924(a)(5), a "willful" state of mind is applicable. *For purposes of 18 U.S.C. 924(a), the Committee intends "willful" conduct to cover situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law.*

S. Rep. No. 583, *supra*, at 19-20 (footnotes omitted and emphasis added).

The 1984 bill, as amended, was never brought to the floor of the Senate, and the Senate did not take action on it. At the outset of the 99th Congress, however, Senator McClure reintroduced essentially the same bill, as S. 49. See 131 Cong. Rec. 24 (1985). Because the bill had already been approved by the Judiciary Committee, it was not referred to committee and went straight to the floor of the Senate. *Ibid.* During debate on the bill in the Senate, Senator Hatch, the floor manager of the bill, explained to the Senate that "the legislative history of the report to accompany S. 914 from the 98th Congress * * * is the authoritative source for the intent of the Judiciary Committee." 131 Cong. Rec. 18,186 (1985); see also *id.*

at 18,170 (statement of Sen. Symms).¹⁵ The bill was considered and passed by the Senate, without pertinent amendment, on July 9, 1985. See *id.* at 18,155-18,237.

2. Contemporaneously with the introduction of S. 49 in the Senate, Representative Volkmer introduced corresponding legislation (H.R. 945) in the House of Representatives. See 131 Cong. Rec. 1847-1848 (1985); H.R. Rep. No. 495, *supra*, at 4. Following hearings by its Subcommittee on Crime, the House Judiciary Committee rejected H.R. 945. See H.R. Rep. No. 495, *supra*, at 21.¹⁶ In explaining its reasons for rejecting H.R. 945, the Committee addressed among other things the provision in H.R. 945 requiring "proof of 'willfulness' to convict for many [Gun Control Act]

¹⁵ During the Senate debate, supporters of the bill described their understanding of the effect of the bill's imposition of a requirement that violations be shown to be knowing or willful. See 131 Cong. Rec. 18,155 (1985) (statement of Sen. McClure) (bill will "[m]andate an element of criminal intention"); *id.* at 18,178 (statement of Sen. Hatch) ("bill will provide a mens rea standard for violations under the code and redirect enforcement efforts toward violent intentional crimes, instead of recordkeeping errors"); *ibid.* ("No longer is honest intent irrelevant; most violations must be proven willful, undertaken with illegal intent."); *id.* at 18,182-18,183 (statement of Sen. Sasser) ("Now the Government must prove, beyond a reasonable[] doubt, that a violation was willful before it can obtain a conviction. A technical violation, by one who did not intend to break the law, can no longer form the basis of life-wrecking felon status.").

¹⁶ As amicus NACDL observes (Br. 12, 15 n.11, 16), H.R. Rep. No. 495 has sometimes been incorrectly treated as the authoritative Committee Report on FOPA. See 1986 U.S.C.C.A.N. 1327. In fact, H.R. Rep. No. 495 was a report on an entirely different bill that was ultimately rejected by the House.

violations." *Id.* at 10. The Committee Report observed:

Case law interpreting the criminal provisions of the GCA [has] required that the government prove that the defendant's conduct was knowing, but not that the defendant knew that his conduct was in violation of the law. The criminal law traditionally does not require proof that the defendant knew that his conduct was in violation of the law.

It appears that the intent of the authors of the "willfulness" requirement of S. 49/H.R. 945 is that the prosecution have to prove that the defendant knew the details of the law, understood that his conduct would violate the law, and intentionally set out to violate the law. This would constitute an almost impossible, and almost unprecedented[,] burden on the prosecution. Proponents of the willfulness standard argue that the offenses for which the standard would apply are mere regulatory offenses, for which a conscious and specific intent to violate the law should be required. * * * The Committee believes that * * * a person who engages in the business of selling hand grenades or machine guns should not escape prosecution solely on the grounds that the government cannot produce witnesses to whom the defendant admitted knowledge that such conduct requires a federal license and a determination to violate the law.

Id. at 10-11 (footnotes omitted).

As the result of this and other concerns relating to S. 49 and H.R. 945, the House Judiciary Committee's Subcommittee on Crime drafted a substitute of its own, H.R. 4332, 99th Cong., 2d Sess. (1986), which the

Committee unanimously approved. See H.R. Rep. No. 495, *supra*, at 21. The Committee "specifically rejected the proposals in S. 49 and H.R. 945 that a standard of 'willfulness' be adopted as a state of mind requirement for certain offenses." *Id.* at 26. H.R. 4332 therefore provided for criminal penalties upon a showing of a knowing violation of the Gun Control Act. *Id.* at 40-41; 132 Cong. Rec. 6864 (1986).

When H.R. 4332 reached the House floor, however, Representative Volkmer offered an amendment in the nature of a substitute. 132 Cong. Rec. 6865 (1986). Representative Volkmer's amendment was similar to the bill passed by the Senate, and required proof of knowing violations of the Gun Control Act for some offenses and proof of willful violations for others. *Id.* at 6867. At the outset of the floor debate on his amendment, Representative Volkmer took the opportunity to explain the intended meaning of the term "willfully":

MR. MCCOLLUM. I would like to enter a colloquy with the sponsor of this amendment, Mr. Volkmer, regarding the meaning of the term "willfulness" as it appears in his amendment. My purpose is to clarify the congressional intent with regard to "willfulness." Is the gentleman agreeable?

MR. VOLKMER. I am.

MR. MCCOLLUM. I would like to know if it is the gentleman's intent to imply the same meaning of the term "willfulness" that the other body intended. The Judiciary Committee in the other body filed a report on the predecessor of S. 49, the companion to your bill, H.R. 945, during the last

Congress. In the Judiciary Report 98-583 on page 20, the Judiciary Committee of the other body stated:

For purposes of 18 U.S.C. 924(a), the committee intends "willful" conduct to cover situations where the offender has actual cognizance of all of the facts necessary to constitute the offense, but not necessarily knowledge of the law.

Is this intent consistent with the gentleman's understanding of the meaning of the term "willful" in the gentleman's substitute?

MR. VOLKMER. Yes, it is identical to the Senate meaning.

MR. MCCOLLUM. So by adopting the gentleman's language, the House will intend the same interpretation that the other body intends. I thank the gentleman from Missouri.

Id. at 6870.

Despite Representative Volkmer's remarks, opponents attacked the amendment on the ground that use of the term "willfully" would require the prosecution "to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law." 132 Cong. Rec. 6875 (1986) (statement of Rep. Hughes); see also *id.* at 6881-6882 (statement of Rep. Smith). Conversely, supporters described the *mens rea* requirement imposed by the amendment in much narrower terms. See, e.g., *id.* at 6861 (statement of Rep. Boehlert) ("the Government must prove that [the defendant's] actions were 'willful'—that the citizen violated the law with

some sort of criminal intent"); *id.* at 6849 (statement of Rep. Alexander) (amendment protects gun owners from being prosecuted for "simple unintentional errors in obtaining a firearm," by "requiring that Federal agents prove criminal intent in the prosecution of such cases").

Following the debate, Representative Volkmer's substitute was passed by the House. 132 Cong. Rec. 7086-7088 (1986). The Senate then adopted the House version of the legislation, making several amendments, and an agreed-upon revision was passed by both Houses and signed by the President. See *id.* at 9598-9608, 9761, 12,073.

3. These extensive legislative materials provide substantial support for the conclusion that Congress did not intend, through the use of the term "willfully" in Section 924(a)(1)(D), to require proof of a defendant's specific knowledge of the law. The "authoritative" Senate Committee Report expressly indicates that Congress's use of the term "willfully" was not intended to require the government to prove a defendant's "knowledge of the law."¹⁷ S. Rep. No. 583,

¹⁷ Amicus NACDL (Br. 10) speculates that the language in the Senate Report was "a mistake." That speculation is unwarranted. First, the idea that the Report inadvertently misdefined a crucial term in the bill is difficult to reconcile with the fact that the same language was read on the floor of the House, and was expressly adopted by the sponsor of the bill as stating the intended meaning of the term "willfully." 132 Cong. Rec. 6870 (1986) (statement of Rep. Volkmer). Second, the Senate Report's less demanding construction of "willfully" is easily understood when viewed in the context of the compromises made by the sponsors of the legislation in order to accommodate the objection of the Bureau of Alcohol, Tobacco and Firearms that the bill would "pose legitimate law enforcement problems." S. Rep. No. 583, *supra*, at 20.

supra, at 19-20; 131 Cong. Rec. 18,186 (1985) (statement of Sen. Hatch). See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill"). The sponsor of the House version expressly endorsed this understanding of the term. 132 Cong. Rec. 6870 (1986) (statement of Rep. Volkmer). See *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("a statement of one of the legislation's sponsors * * * deserves to be accorded substantial weight in interpreting [a] statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."). And supporters of the bill, in both the House and Senate, repeatedly characterized the bill as imposing a general requirement of proof of criminal intent, without suggesting that the use of the term was intended to require proof that a defendant had specific knowledge of the law. See pp. 39 n.15, 42-43, *supra*. See also *Andrade*, 1998 WL 32345, at *5 ("The proponents of the willfulness requirement, to the extent that we can discover their comments, said nothing to suggest that the term was intended to go beyond its ordinary meaning, that is, awareness that one's conduct is unlawful.").

In support of the contrary view, petitioner and his amici muster only two items. First, they rely on S. Rep. No. 476, *supra*, a committee report prepared for a version of the bill that was not enacted by Congress. See pp. 35-38, *supra*. Such reports are not accorded significant weight. *Ratzlaf*, 510 U.S. at 148 n.18 ("[w]e do not find that Report, commenting on a bill that did not pass, a secure indicator of congressional intent"). According weight to S. Rep. No. 476 would

be particularly inappropriate, because that report was prepared in support of a version of the bill that was not enacted precisely because of concerns about the application of a stringent standard of willfulness to all violations of the Gun Control Act. See pp. 37-38, *supra*. Second, petitioner and his amici rely on statements made in a House Report that opposed enactment of the bill, and during floor debates by opponents of the bill. See pp. 39-40, 42, *supra*. The views of those who oppose a bill, however, are an extremely unreliable indicator of the proper interpretation of the bill. Indeed, amicus NACDL acknowledges (Br. 14) that one opponent's explanation of the willfulness requirement was "undoubtedly an exaggeration." See, e.g., *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents. '[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" (quoting *Schwegmann Bros.*, 341 U.S. at 394); *Carlson v. Green*, 446 U.S. 14, 41 n.7 (1980) (Rehnquist, J., dissenting) (the statement of an opponent of a bill "may be viewed as not unlike the 'parade of horrors' frequently marshaled against a pending measure and not the most reliable source of legislative history"); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.").

D. The Rule Of Lenity Is Inapplicable

Petitioner (Br. 26) invokes the rule of lenity, but that rule is inapplicable. "The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." *United States v. Wells*, 117 S. Ct. 921, 931 (1997) (internal quotation marks omitted). In this case, the Court has ample basis upon which to conclude that Congress did not intend to require proof of specific knowledge of the law to support a conviction for willfully dealing in firearms. That conclusion is supported by the "venerable principle that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf*, 510 U.S. at 149. It is supported by this Court's cases interpreting the term "willfully," which make clear that only in unusual circumstances will that term be understood to require proof that the defendant intentionally violated a known legal duty. See pp. 12-18, *supra*. And it is supported by the structure, purpose, and history of Section 924(a)(1)(D). See pp. 18-45, *supra*. "[T]his is not a case of guesswork reaching out for lenity." *Wells*, 117 S. Ct. at 931.

E. The Jury Was Properly Instructed On The Degree Of Knowledge Required To Show A Willful Violation

The jury in the present case was properly instructed that it could find petitioner guilty if it found that he had a purpose to disobey or disregard the law, even if he lacked specific knowledge of the law he was violating. With respect to the requirement of willfulness, the jury was told:

A person acts willfully if he acts intentionally and purposely and with the intent to do something

the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

* * * * *

In this case, the government is not required to prove that [petitioner] knew that a license was required, nor is the government required to prove that he had knowledge that he was breaking the law. However, the government must prove that [petitioner] acted willfully. In order to satisfy this element, the government must prove that [petitioner] acted knowingly and purposely and that [petitioner] intended to commit an act which the law forbids.

J.A. 18-19.

That instruction specifically advised the jury that it could find petitioner guilty only if it found that he acted "with bad purpose to disobey or disregard the law." An instruction of this kind sufficiently informs the jury that general knowledge of illegality is required, because a defendant can act with a *purpose* to disobey the law only if the defendant is aware, at some level of generality, that the law prohibits his actions. Cf. 1 L. Sand et al., *Modern Federal Jury Instructions* ¶ 3A.01, at 3A-18 (1997). Moreover, the instruction properly informed the jury that the government was not required to prove that petitioner was aware of the specific law he was violating, or knew that a license was required before he could deal in firearms. See *Andrade*, 1998 WL 32345, at *4 (the jury was properly instructed that it could convict the

defendant of conspiracy to deal in firearms without a license if it found he acted "with knowledge that his conduct is unlawful," and that the government was not required to prove that "the defendant knew of the specific statute that he was charged with violating or that he intended to violate that particular statute").

The instruction added that: "nor is the government required to prove that he had knowledge that he was breaking the law." J.A. 19. That phrase did not negate the requirement, conveyed earlier in the instructions, that a purpose to disobey the law was necessary. In context, that phrase indicated only that the government was not required to prove that the defendant was certain that his conduct was illegal or that he knew his conduct violated the particular law at issue, *i.e.*, the licensing requirement. Taken as a whole, the instructions adequately conveyed the concept of willfulness. See, *e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (instructional language "must be considered in the context of the instructions as a whole").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 921(a)(21)(C) of Title 18 of the United States Code provides:

The term "engaged in the business" means

* * * * *

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

2. Section 922 of Title 18 of the United States Code provides in pertinent part:

(a) It shall be unlawful —

(1) for any person —

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

3. Section 924(a)(1) of Title 18 of the United States Code provides:

Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

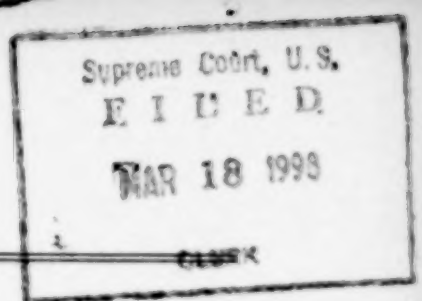
(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(1)
No. 96-8422



In The
Supreme Court of the United States
October Term, 1997

— ♦ —
SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

— ♦ —
On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

— ♦ —
REPLY BRIEF FOR PETITIONER

— ♦ —
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ARGUMENT IN REPLY

I

PETITIONER'S CONVICTION FOR WILLFULLY VIOLATING THE FEDERAL FIREARMS DEALER STATUTE REQUIRES PROOF OF KNOWLEDGE OF THE LICENSING REQUIREMENT

Using methods like those of the ancient alchemist, the Government's brief attempts to engage in a form of legislative transmutation to distill an acceptable meaning to Section 924(a)(1)(D)'s "willful" scienter requirement which appears on the surface to be more burdensome than "knowing," but in reality requires less than proof of knowledge of licensure. Its attempt is simultaneously legally transparent and logically unconvincing.

A. The Government's Standard

The Government (Br. p.11, fn.2) seeks to distinguish cases such as *United States v. Obiechie*, 38 F.2d 309, 315 (7th Cir. 1994) in which, as Judge Rovner's opinion reveals, the Government has failed to convincingly argue¹ any basis for distinguishing between "knowing" and "willfully":

The Government could only suggest that the term willfully may require actual knowledge of the facts constituting the offense, whereas knowingly would include, as well, the ostrich defendant who deliberately disregards, or consciously avoids those facts. The unanimous Seventh Circuit opinion unequivocally held:

In our view, the only reasonable distinction between Section 924(a)(1)(D)'s knowing and willfully standards is that the latter requires knowledge of the law.

¹ In *United States v. Rodriguez*, 132 F.3d 208, 211 (5th Cir. 1997), Judge Higginbotham's opinion recites that the Government conceded that knowledge of the law is the correct legal standard. That is, indeed, the law, and the Government knows it.

Respondent suggests (Br. 14) that willful behavior can include not only knowledge that one's conduct was unlawful, but also, conduct amounting to a "reckless disregard" of the requisite licensing standard – a position which in 1994 the Government told the Court was the lesser standard of "knowing" conduct. Now, the Government (Br. 16) says a defendant may be convicted under Section 924(a)(1)(D) who acted, merely "recklessly."²

To serve this end, the Government suggests that it can "live with" an interpretation of "willfully," which merely requires proof that the Defendant acted with a *general knowledge* that his conduct was unlawful. This standard apparently achieves the goal of implying that this scienter's level is more severe than "knowing," and somehow operates as a form of legislative "spin control" to limit "willfully." We strongly disagree.

The apparent source for the suggested "general knowledge of illegality"³ standard stems from *United States v. Collins*, 957 F.2d 72 (2d Cir.), *cert. den.*, 504 U.S. 944 (1992). Thus, Judge Boudin's opinion in *United States v. Andrade*, ___ F.3d ___, 1998 WL 32345 (1st Cir. 1998) was foreshadowed by, and is a further extension of his opinion for the Court in *United States v. Hurley*, 63 F.3d 1, 16 (1st Cir. 1995), *cert. den.*, 517 U.S. 1105 (1996), where in focusing upon the co-defendants Saccoccio, who were charged in a racketeering conspiracy, *inter alia*, to launder drug proceeds, the Court opined that generalized knowledge was sufficient to convict.

Judge Boudin's "generalized knowledge of illegality," standard not merely undercut his own Court's prior *en banc*

² This in contrast to a standard of "conscious avoidance" where efforts to affirmatively not know, exist (see *United States v. Jewell*, 532 F.2d 697 (7th Cir.), *cert. den.*, 426 U.S. 451 (1976)).

³ In *Collins*, *supra*, the defendant failed to object to the omission of a willfulness jury instruction. As such, *Collins* was, in reality, a distinguishable plain error case (he claimed entrapment), which was affirmed by the Court of Appeals, on a harmless error basis. Judge Altimari's discussion of willfulness was, accordingly, pure dictum.

opinion in *United States v. Aversa*, 984 F.2d 493, 499-500 (1st Cir. 1993) but was advanced against evidence that Kenneth Saccoccio admitted on tape that he knew laundering was illegal. Thus, the objection, "even if they do not know the *precise* requirements of the law" *Hurley*, *supra* p. 16, is belied by the facts, (but cf. *United States v. Vasquez*, 53 F.3d 1216, 1225-1226 (11th Cir. 1995)) (rejecting Government's suggested adoption, post-*Ratziaf*, of a "generalized knowledge" standard); accord *United States v. Rodriguez*, 132 F.3d 208, 213 (5th Cir. 1997) (per Higginbotham, J.).

The Government misstates the meaning of "willfully," and misleadingly claims that only those able to cite statutory "chapter and verse" can be convicted. Finally, in a supposed *coup de grace* demonstrating what knowledge of licensure constitutes, Judge Boudin strikes down this "strawman" argument:

To impose such a requirement of detailed knowledge of the firearms statute (to which few judges could pretend) would make an enforcement of the gun dealer laws very difficult.

(*United States v. Andrade*, *supra* p.4)

The resort to linguistic distortion, and the erection of a strawman argument that Petitioner seeks to require the Government to prove detailed statutory knowledge is a thinly veiled smoke screen to distract from the deficient language in jury charges which clearly stated that knowledge of licensure was *not* an element of the crime. Presumably, the jury followed these instructions. Thus, "general knowledge" is a clever lawyer's invention – but enjoys no endorsement from the Congress, or actual case support. As such, it should be rejected as an artificial device intended to secure in the courthouse well what could not be achieved on the Capitol floor.

The Government contends that its diminished view of "willfully" is applicable because the Solicitor General views all guns as "inherently dangerous." However, Congress did not voice such a view, being disinclined to even enter the field of gun regulation until well after the mid-point of the twentieth century.

Thus, the Government's view was rejected in *Staples v. United States*, 511 U.S. 600 (1994) (absent proof defendant knew weapon possessed automatic firing capability, conviction improper) and *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (firearm components sold in kit form not an assembled firearm for tax purposes) (26 U.S.C. § 5821). The Court has refused to make a judicial finding that firearms are *per se* highly dangerous as compared to, for instance, such dangerous instruments as hand grenades (*United States v. Freed*, 401 U.S. 601 (1971)) or silencers (e.g., *United States v. Endicott*, 803 F.2d 506, 508-509 (9th Cir. 1986); *United States v. Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984)).

This Court has squarely rejected labeling firearms inherently dangerous whenever the Government sought to have this view judicially sanctioned – a posture clearly respectful of Congressional determination that to do so would criminalize a wide range of apparently, and reasonably perceived, innocent citizen conduct. In this case, the weapons were obtained in Ohio, where a firearms permit is not even required – only a photo identification. The Government fails to explain how even a generalized knowledge of dealer licensure exists.

Thus, to cite, as the Government does, *United States v. Balint*, 258 U.S. 250, 253 (1922), is both an unwarranted and disturbing attempt to analogize firearms to “narcotics.” *Balint*'s application of the Anti-Narcotic Act of 1914 must be viewed against an explicit Congressional intent, as Chief Justice Taft wrote, to combat the spread of drugs. The drug statute drafters declined to protect sellers or buyers who professed to be innocent purchasers of strictly controlled substances universally accepted as potentially deadly.

In the case at bar, the drafters of the Firearms Owners Protection Act (FOPA), were not merely prompted by such concerns, they clearly acted upon them. Thus, *Balint* should be properly confined to inherently dangerous substances, the mere possession of which is *malum prohibitum*. Such cannot be said about firearms that have enjoyed presumptive constitutional protection, since the adoption of the Second Amendment back in 1791.

B. The Language Employed

The Government's standard cannot be applied in the face of statutory language which clearly penalizes only a person who:

willfully violates any other provision of *this chapter*. (emphasis supplied)

This language, coupling the *mens rea* standard of “willfully” to the provisions of *this chapter*, is clearly analogous to the language of 31 U.S.C. § 5322(a), upon which *Ratzlaf* ruled, which penalized any:

person willfully violating *this subchapter*. . . . (emphasis supplied)

Where the identified mental state is congressionally linked to statutorily enumerated “Provisions,” “Chapter,” or “Section,” it clearly requires knowledge of the Provisions, Chapter, or Section, and not something different or less. Had Congress intended a mere generalized state of knowledge, it presumably would have penalized those who knowingly or willfully engage in specified *acts* – or *conduct*. It did not do so, and the distinction, this Court has noted, is critical (see *Kawaauhau v. Geiger*, ___ U.S. ___, slip opn. p.4 (3/3/98)).

Thus, the draftsmanship employed herein is similar to that followed in *Ratzlaf v. United States*, 510 U.S. 135 (1994) and *Liparota v. United States*, 471 U.S. 419 (1985), i.e., the adverb “willfully” modifies the statute, rule or regulation and not merely the enumerated factual conduct or behavior. The Government's suggested view is antithetical to this Court's accepted and articulated notions of statutory construction, and, inflicts unwarranted violence to the positive jurisprudential benefits of *stare decisis*. This Court should reject the “siren song” of such a subjective *ad hoc* approach. At the very least this language should trigger the rule of lenity, as it did in both *Ratzlaf* and *Liparata*.

C. "Willfully" Has the Same Meaning in Both Section 924 and Section 923

Petitioner argues that when FOPA was adopted, "willfully" already enjoyed a settled meaning under Sec. 923, and Congress intended that same meaning to apply when it added the "willfully" standard to Sec. 924 (Br. at 14-15). The Government responds that the willfully standard of Section 923 is inapplicable here because it is derived from civil cases, its meaning is indefinite, and there is allegedly "no suggestion in FOPA's extensive legislative history that Congress intended to adopt any of the varying definitions of 'willfully' articulated in the . . . cases that had defined the term . . . under Sec. 923." (Govt. Br. at 28-29).

This approach amounts to an argument that "willfully" as used in Section 923 has a different meaning from the same word when it is used in Section 924. This violates a basic canon of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143. Certainly the same word should not be interpreted differently in adjoining sections of a law absent clear indication that a contrary meaning was intended. This is especially true here since the anomalous result would be that the *mens rea* standard would be higher in a civil license revocation case than in a criminal prosecution.

Far from being silent on this point, as the Solicitor General contends, the legislative history reveals that the identical meaning of "willfully" was intended for both civil and criminal cases under Sections 923 and 924.

Senate Report 98-583,⁴ reflects the Committee's intent to apply the willfully standard used in *Rich v. United States*, 383 F. Supp. 797, 800-01 (S.D. Ohio 1974) to civil cases. S. Rep. 98-583 at 14 & n.30. *Rich* holds that the correct standard under Sec. 923 is the "criminal" standard, and that "willfully"

⁴ Although this Report is from a prior Congress, the Government relies on it as authoritative elsewhere in its brief (Br. at 35-38, 43-44).

means that the licensee "shall have purposefully or intentionally failed to obey the statute[.]" *Rich* at 800.⁵

The nexus between Sec. 923 and Sec. 924 is also demonstrable in the 1983 Senate Hearings. In response to written questions from Senator Kennedy, the Treasury Department observed both that a willful violation was already required for license revocations, and that the Administration did not believe that the addition of this element in criminal cases would be an impediment to successful prosecutions. Hearing on S.914 (98th Cong., 1st sess., 1983) at pp. 58-59 (questions h and i).

Accordingly, both basic rules of statutory construction, and FOPA's legislative history make clear that "willfully" bears the same meaning in Section 924 that it has in Section 923. This is the meaning Petitioner advocates.

D. The Presumption of Knowledge of State Laws in Section 922(b)(3) Supports Petitioner's Definition of Willfully

FOPA added a presumption to the firearms law that licensees who make permitted sales to customers residing in another state are "presumed . . . to have . . . actual knowledge of the State laws and published ordinances of both States." 18 U.S.C. § 922(b)(3). Although only a willful violation of the interstate sales provision is punishable civilly (Section 923) or criminally (Section 924), the Government argues that adoption of this presumption is not a sign that Congress intended a willful violation to reach only those who know the law, and intend to violate it (Gov. Br. at 27-28).

⁵ The Report also cites *Shyda v. Director, BATF*, 448 F. Supp. 409, 415 (M.D. Pa. 1977) (BATF must prove that licensee "knew of his legal obligation and purposefully disregarded or was plainly indifferent to" it); and *Mayesh v. Schultz*, 58 F.R.D. 537, 539-40 (S.D. Ill. 1973) (willful violation found where licensee acknowledged he knew the law and proceeded to violate it).

It is established law that a "willful" violation for the purpose of license revocation requires the licensee's awareness of the relevant law. Thus, in the civil context, Congress was clearly presuming knowledge of State law in order to facilitate licensee discipline for those who make improper interstate sales. Congress could scarcely have believed and intended to use a different and lesser standard of "willfully" that would make a criminal conviction easier to obtain than a license revocation.

E. The Cases Cited By Respondent Do Not Support Its Interpretation of FOPA

In support of its Alice in Wonderland "Queen of Hearts" view of the meaning of "willfully," Respondent cites (Br. 15) to this Court's holding in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219 (1997).

In *Lanier*, this Court reviewed the Sixth Circuit's reversal of the conviction of a Tennessee Judge who sexually assaulted women when not ruling on family law matters. The question was whether Lanier, a veteran local Judge, could be convicted of violating a federal post-Civil War reconstruction civil rights statute in the absence of a Supreme Court holding on facts (unwanted sexual advances) "fundamentally similar" to those alleged in *Lanier*.

The issue was not whether Lanier acted "willfully," but rather, whether 18 U.S.C. § 242 applied to non-consensual sexual misconduct. This Court held that when a Judge's chambers is converted into a bordello, the Courts should not impose statutory glosses (as did the Sixth Circuit) to heighten the burden of proof.

Additionally, puzzling reference is made at page 18 of the Government's brief to this Court's holding in *Bates v. United States*, ___ U.S. ___, 118 S.Ct. 285, 290, n.6 (1997).

In *Bates*, this Court reviewed an order of the Seventh Circuit reversing dismissal of an indictment charging the defendant with misapplying student loan funds in violation of 20 U.S.C. § 1070 *et seq.*

As Justice Ginsburg's opinion made clear, the statute in question (20 U.S.C. § 1097(a)) was *prima facie* violated when Bates knowingly and willfully misapplied the insured student loan funds. Congress did not impose an *intent to defraud* scienter requirement, whereas companion Sec. 1097(d) did. Mindful of the absence of an "intent to defraud" requirement in cases brought under Sec. 1097(a), the Court unanimously declined to impose one where Congress had not.

Bates simply reaffirms that where, as here, statutory subsections employ varying mental states, accepted rules of statutory application require the Court to employ the more rigorous standard where applicable, and to refrain from engaging in legislative redraftsmanship where Congressional intent is clear. Since Congress clearly applied *willfully* to Petitioner's conduct, the suggestion that applying a concocted Justice Department standard closer to *knowingly* is the very essence of self-serving interpretation which *Bates* found inappropriate.

We think it fair to say, and a reading of page 21 of the Government's brief is not inconsistent with the view, that the legislative initiatives which led to FOPA's enactment sought not surprisingly, as the title announces, to *protect* firearms owners and users from fear of potential federal prosecution (*cf. United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (construing "Clean Water Act" broadly as an ameliorative statute to prohibit discharge of pollutants into "navigable waters")). Thus, the Government grudgingly recognizes that the use of "willfully" in 924(a)(1)(D) was intended to simultaneously distinguish, and heighten, the Government's required evidentiary proof. Burden of proof enhancement was intended, and achieved notwithstanding objection by the Bureau of Alcohol, Tobacco and Firearms.

The logical import of requiring proof of *knowledge* that one's conduct is unlawful in a Sec. 922(a)(1)(A) prosecution, must of necessity mean knowledge that a dealer's license is required. It is that status of licenses upon which lawfulness hinges; no other issue or intent is either relevant, or required.

It is, we respectfully submit, not the proper role for judges to sit as "roving commissions," rounding off, or eliminating perceived difficulties of proof imposed by the legislative branch. Were this proper,⁶ then, perhaps, such landmark holdings or *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Brown v. Board of Education*, 349 U.S. 294 (1955) could be viewed as wrongly decided, not because they were somehow constitutionally infirm, but because some Judges felt that confessions would be harder for police to elicit, and others believed that desegregation required bussing too costly to taxpayers, and nettlesome for local schoolboards to implement. Such views, are not merely constitutionally unacceptable, they are symptomatic of an impotent view of constitutional law which seeks to help the sovereign simply because it protests that constitutional compliance is too taxing.

What is required is proof, direct or circumstantial, that a defendant knew he needed a license, not knowledge of the specific law, section, paragraph, or regulation where licensure is found. The jury charges in *Bryan*, and *Andrade* fail constitutional muster because the Government was relieved of proving an element of the crime – willful violation of required licensure. —

F. The Legislative History Supports Petitioner's Interpretation of the Statute

The Government agrees with Petitioner that resort to legislative history is not needed to resolve this case. Nevertheless, in the legislative history section of its brief (pp. 34-45), the Government argues that the proper definition of willfully in 18 U.S.C. § 924(a)(1)(D) is that "the offender has actual cognizance of the facts necessary to constitute the offense, but not necessarily knowledge of the law," a standard it finds in a Senate Report from a prior Congress. It is important to note that this standard, which does not require

⁶ The Fifth Circuit perceived no such problem in *United States v. Rodriguez*, *supra*, in affirming the conviction.

awareness one is acting unlawfully, is not the same definition of willfully that the Government advocates in the remainder of its brief, *i.e.*, the standard requiring "proof that the defendant was generally aware that his conduct was unlawful." (Br. at 8). Thus the Government appears to concede at the outset that the standard it advocates in the rest of its brief lacks legislative support in FOPA's history.

There is no Senate report on FOPA in the 99th Congress, and the Senate Reports in prior Congresses appear to vacillate as to willfully's meaning. In addition, the predecessor Report relied on by the Government is so self-contradictory that the leading FOPA commentator rationalizes that drafters mistakenly used "willfully" when they meant "knowingly." David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 648-51 (1987).

The House of Representatives Committee Report on FOPA in the 99th Congress, stated clearly that the "violation of a known legal duty" standard was intended. Most of the floor debate agrees, although there is one contrary colloquy. Mindful of the size, diversity and political differences which routinely prevail, such lack of unanimity is neither surprising, nor disabling. On balance, the weight of the legislative history favors the "known legal duty" definition of "willfully."

1. The House of Representatives

As is detailed in petitioner's brief, House Report No. 99-495 is the only committee report on the FOPA legislation in the 99th Congress. Pet. Br. at 17-20; *see Hardy, supra* at 588. As the only committee report that accompanied any version of FOPA proposed in that Congress, the House Report contains the only explanation of the meaning of "willfully" that members had before them when the proposed law was considered.

The House Report is clear that the willfulness requirement means that a conviction for unlicensed gun sales requires proof of the defendant's "knowledge that such conduct requires a federal license, and a determination to violate that law." House Report No. 99-495 at 11. During the House

debate concerning the "willfully" standard, Rep. Hughes, Chair of the Subcommittee on Crime and floor manager of H.R. 4332, confirmed that the "willfully" standard requires the prosecution to prove "that the dealer was personally aware of . . . the law, and that he made a conscious decision to violate the law." 132 Cong. Rec. H1684 (daily ed. April 9, 1986) (statement of Rep. Hughes).

The House retained this "willfully" standard in its version of FOPA. As Hardy notes, the final House bill combined the Judiciary Committee's bill (H.R.4332), the bill that had passed the Senate (S.49) and the original Volkmer substitute (H.R.945). Hardy, *supra* at 625.⁷ As one member noted, the bill was not S.49 nor the original Volkmer bill. 132 Cong. Rec. H1657 (daily ed. April 9, 1986) (statement of Rep. Smith). The House bill passed the Senate intact, without a conference. Hardy, *supra* at 625. Therefore, because the House Report is the only committee report on FOPA in the 99th Congress, and because the House bill ultimately became law, the House Report is the authoritative committee FOPA report.⁸

The Government's argument that the House legislative history favors its position is based on a brief colloquy between Representatives McCollum and Volkmer (Gov. Br. at 41-42, 44). However, this single colloquy cannot outweigh the consistent House Report and contrary floor debate (*see Brock v. Pierce County*, 476 U.S. 253, 263 (1986)). The comments of a single member, even a sponsor, are outweighed by the statutory language and structure (*Posters n' Things v. United States*, 511 U.S. 513, 522 n. 12 (1994)). This single exchange

⁷ Changes made on the floor of the House included two amendments sponsored by Rep. Hughes, a prohibition on the sale or possession of machine guns (132 Cong. Rec. 7085), and a prohibition on the interstate sale of handguns (132 Cong. Rec. H1704 (daily ed. April 9, 1986)).

⁸ Thus, the Government's claim that the U.S. Code Cong. & Admin. News "incorrectly" chose the House Report as the pertinent committee report is itself mistaken (*see* Gov. Br. at 39 n.16).

on the floor cannot bear the weight the Government places on it.

2. The Senate

There is no Senate Report on S.49, the version of FOPA which first passed the Senate in the 99th Congress. The Senate Report on a predecessor bill, S.1030, opines that a willful violation is one "intentionally undertaken in violation of a known legal duty." S. Rep. 97-476 at 22. While Senate Report 98-583 (on S.914, another predecessor version) contains language that appears to say otherwise, that language is severely contradicted by other portions of the same Report.

There is no Senate Report on S.49 because it was not sent to Committee. This occurred because, after the majority leader refused to bring FOPA to the floor in the 98th Congress, its sponsors agreed to drop an effort to attach it as an appropriations rider only after they extracted a promise that their bill would not be relegated to Committee in the next Congress, but would remain on the floor for a vote. Hardy, *supra* at 611-12.

Nevertheless, the Government now contends that Senate Report 98-583 should somehow be deemed the Committee Report on a bill in the next Congress (Br. at 35-38, 43-44). This contention rests on a single phrase in a speech by Senator Hatch (italicized below), that, we respectfully submit, has been wrenched out of context (Br. at 38).

When read in context, it is clear that Senator Hatch believed that S. Rep. 98-583 was the source of legislative intent for only one provision of FOPA. In support of his amendment to delete from S.49 a provision at the end of Section 924(a) that read, "Provided, that no person shall be prosecuted under this subsection where the conduct of such person involves simple carelessness," Sen. Hatch argued:

Madam President, during negotiations in the 98th Congress relative to the scienter or state of mind requirements, there was a discrepancy between what the parties understood the term "knowing" to mean. Senator McClure . . .

expressed his concern that some courts have diluted "knowing" to mean "belief" or "reckless disregard" rather than "actual cognizance." The simple carelessness language was added to the bill to clarify that the holding and rationale of those cases would not apply to the offenses covered by this bill. Unfortunately, attempting to set aside those cases by the addition of the simple carelessness language creates needless confusion and contradictions in S. 49. Accordingly, this objective is more properly handled by the legislative history of the report to accompany S. 914 from the 98th Congress, which is the authoritative source for the intent of the Judiciary Committee, and the clear understanding of the manager and supporters of this bill that these cases are not to be applied as a guide in ascertaining the meaning of the term "knowingly." . . . [W]e intend to exclude the following cases from any consideration of the meaning of the term "knowingly": [lists cases]

* * *

The ambiguity and confusion inherent in the term "simple carelessness" might only be partially overcome by extensive legislative history explaining the narrow purpose of this terminology. It seems far preferable to devote that legislative history to Congress' intent that the cases I have mentioned above not be applied to offenses occurring under this act.

131 Cong. Rec. S9131-32 (daily ed. July 9, 1985) (emphasis added).

It is clear that Senator Hatch utilized the Senate Report on S.914 to explain why the "simple carelessness" provision should be deleted, and to elucidate one aspect of "knowing" in S.49. His was not a general statement that the Report from the prior Congress should be incorporated by reference as the Report on S.49. Nor is there any evidence that Senators participating in this debate understood that the prior Report,

which they probably never saw, and which concerned a bill that did not reach the floor, was the current bill's Report.

Consequently, the Government's reliance on the statement from Senate Report 98-583 (at p.20), that willful conduct includes "situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law," is no more the authoritative legislative history of S.49 in the 99th Congress than is the statement in Senate Report 97-476 (at p.22) that "willful violations [are] those intentionally undertaken in violation of a known legal duty."⁹

Moreover, the statement in Senate Report 98-583 may be nothing more than an inadvertent error by the drafter of the Report in writing "willfully" when what was meant was "knowingly." That is the position taken by David Hardy, the statute's recognized preeminent authority. See, e.g., *United States v. Hayden*, 64 F.3d 126, 129 (3rd Cir. 1995); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (*en banc*); *United States v. Obiechie*, 38 F.3d at 312.

What was new in the 98th Congress' version of FOPA was the application of a "knowingly" standard to some violations, instead of applying "willfully" to them all (*see* Gov. Br. at 37). That is what is being explained in both the paragraph cited by the Government and the following paragraphs. Thus, it is probable that at this point the Report intended to define "knowing," not "willful." Hardy, *supra* at 648-49 & n.347.

In addition, the Report's definition, that a defendant must have "actual cognizance of the facts necessary to constitute the offense, but not necessarily knowledge of the law," defines a "knowing" *mens rea*, not a "willful" one. See *Staples v. United States*, 114 S.Ct. at 1797-98 ("knowing" *mens rea* means that defendant must "know the facts that make his conduct illegal"). If this was how the committee attempted to

⁹ And, as noted above, the standard in Senate Report 98-583 is not the Second Circuit's *Collins* standard that the Government has been advocating in this appeal. The *Collins* standard is found nowhere in the legislative history.

define "willfully," it is difficult to imagine what was intended to define the lesser standard of "knowing" in Sec. 924(a)(1). Nor is there any mention in the Report of an intent to alter the definition of willful that was used by the Committee in the prior Congress (*see Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988)).

Additional support for Hardy's position is found in Senator Hatch's reference to the Senate Report that is quoted at length above. He states that his purpose is to make clear that the correct definition of "knowing" is the "actual cognizance" standard in S. Rep. 98-583. However, "knowing" is not defined in that Senate Report. The only Report definition is that "willfully" involves actual cognizance of the facts. Senator Hatch apparently thought, as Hardy powerfully surmises, that the Senate Report attempted to define "knowing," not "willful."

Senate Report 98-583 recites that the Committee's decision regarding the use of "willfully" was influenced by concerns expressed by the Administration at the Hearings on S.914. Those Hearings make plain that the sole Administration sought changes concerned the number of violations to which the willfully standard would apply. The hearings support petitioner's view of the meaning of "willfully." For example, the Report cites to p.22 of the Hearings. S. Rep. 98-583 at 20 n.44. Turning to that page, we find a chart stating that "Willfulness, i.e., knowledge of the requirements of the law" was "not an element of proof" for a violation of the Gun Control Act under present law, but would be required for certain prosecutions under the bill the Committee was reporting out. Hearing on S.914 (98th Cong., 1st sess., 1983) at 22 (emphasis added).

The Treasury Department agreed with this position. Its response to written questions from Senators also supports Petitioner's view. *See, e.g.*, answer to question 5 submitted by Sen. Thurmond, Hearings at p. 48 ("in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal Law" he wouldn't violate the provisions that require willfulness); answer to questions h and i submitted by Sen. Kennedy at pp. 58-59 (a willful violation is

already required¹⁰ for license revocation, and will not be an impediment to successful prosecutions).

In sum, the weight of the legislative history supports Petitioner's definition of "willfully," although that history, as with many legislative initiatives, is not free from confusion and contradiction. However, when such is found, the application of the rule of lenity¹⁰ (Petitioner's Br. p. 26) becomes operational.

II

THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT THE GOVERNMENT MUST PROVE THE PETITIONER'S KNOWLEDGE OF HIS OBLIGATION TO POSSESS A FEDERAL FIREARMS DEALERS LICENSE DIMINISHED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED PETITIONER OF A FAIR TRIAL

At page 46 of its brief, the Government contends that the jury charge delivered by Judge Trager was legally accurate. It does so even as it is forced to acknowledge Judge Trager's admonition:

[T]he Government is not required to prove that [Petitioner] knew that a license was required, nor is the Government required to prove that he had knowledge that he was breaking the law (JA. 18-19).

¹⁰ The Government's attempt to eviscerate the applicability of the rule of lenity is without merit and its reliance upon this Court's holding in *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 931 (1997) misplaced. *Wells* involved a prosecution for making false statements to a federally insured bank in violation of 18 U.S.C. § 1014. The issue turned upon whether materiality of the statement must be proven. The statute did not require that materiality be pleaded or proven (*see Wells*, at 927). Accordingly, the citation of *Wells* for the proposition that the rule of lenity is irrelevant is misplaced. In *Bryan* the issue to be resolved is the meaning of *willfully* – a statutorily enumerated mental state.

Thus, the jury could not possibly have known that it was required to find that Petitioner had a "general knowledge that his conduct was unlawful" (Gov. Br. at 11) where such a standard, whatever else it does mean, does not include:

- (1) his knowledge of licensure;
- (2) his knowledge that a law was being broken.

When a Court reviews the instruction given to juries, it is important to bear in mind:

Though some may say, quite properly, that subtle nuances in a Judge's charge fall on deaf ears, there is no assurance that this is so. The juror's difficult task of probing the mind and will of another is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the Court.

(*United States v. Bright*, 517 F.2d 584, 587 (2d Cir. 1975) per Gurfein, J.)

The Government advances *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) for the unremarkable proposition that jury charges are not be viewed out of context, but rather, as a whole. Beyond the fact that *Estelle* came up on habeas review of a California State Court murder conviction, the jury charge there related to the proper use of proof of uncharged prior injuries to McGuire's infant daughter, and not to an element of the offense. Thus, potential constitutionally implicated error cognizable on habeas review, and not compliance with the statutory dictates of an act of Congress, was involved in the review of the jury charge.

Moreover, as the Court in *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) and its progeny (*Francis v. Franklin*, 471 U.S. 307 (1985)) made clear, jury charges are reviewed with a careful eye and a firm recognition of how a "reasonable juror" could have interpreted the instructions, and not a gathering of Law Review luminaries.

Thus, as in *Francis v. Franklin*, *supra*, pp. 321-322, where contradictory or confusing instructions are as here

juxtaposed together, the use of charging language that does little more than hint at, or flatly contradicts the proper standard, will not save the charge from a finding of harmful error. Mere hope or speculation that the jury stumbled or fumbled its way to the correct result will not suffice where the rule of law is deemed to apply.

In *United States v. Rogers*, 18 F.3d 265, 267 (4th Cir. 1994), the Court overturned defendant's conviction for violating 31 U.S.C. § 5322(a), relying upon this Court's ruling in *Ratzlaf* requiring that the jury be properly instructed that "willfully" meant actual knowledge by defendant that his structuring conduct was unlawful. Thus, just as this Court reversed *Ratzlaf's* conviction, so too did the Fourth Circuit in *Rogers* (accord *United States v. Oreira*, 29 F.3d 185, 187 (5th Cir. 1994)).

Mindful that an erroneous burden of proof instruction is not subject to harmless error analysis (*Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)) reversal is required because the jury charge permitted a conviction upon constitutionally deficient proof (*In re Winship*, 397 U.S. 358 (1970)) even under the Government's own retro-fitted *mens rea* standard (see *Rewis v. United States*, 401 U.S. 808, 814 (1971); *Chiarella v. United States*, 445 U.S. 222, 235-236 (1980)). A fair respect for due process of law and the process of our jury system, compels vacatur of the conviction, and a new trial on a fair charge (*McCormick v. United States*, 500 U.S. 257, 274-75 (1991)).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED TO THE COURT OF APPEALS WITH DIRECTION TO VACATE THE CONVICTION OR ORDER A NEW TRIAL.

Dated: New York, New York
March 17, 1998

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No. 96-8422

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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35 pp

QUESTION PRESENTED

In order to convict a person of willfully engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D), may the jury be instructed that "willfulness" means only that the defendant acted knowingly and purposefully, or must the jury be instructed that "willfulness" means that the defendant knew of the licensing requirement and violated a known legal duty?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 9,000 members nationwide--along with 78 state and local affiliate organizations numbering 28,000 members--including private defense lawyers, public defenders and law professors.¹ NACDL's mission is to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. It is also committed to preserving fairness within America's criminal justice system. Founded in 1958, NACDL has a long tradition of safeguarding the rights of persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice.

NACDL submits this brief with the consent of the parties. As an association for criminal defense lawyers, NACDL members have a keen interest in the integrity of the jurisprudence in the federal courts concerning scienter standards in all areas of the criminal law.

¹ No party in this case authored any part of this brief. Printing costs are being paid by NACDL and no other monetary contributions have been made for the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Gun Control Act, as amended by the Firearms Owners' Protection Act (FOPA), 18 U.S.C. § 924(a)(1), punishes whoever "knowingly" commits certain specified acts and whoever "willfully violates any other provision of this chapter." Included under the "willful" category is § 922(a)(1)(A), which makes it unlawful for a person to engage in the business of dealing in firearms without a license.

Because the statute distinguishes between "knowingly" and "willfully," the latter must include something more than the former. Thus, the willful standard must include knowledge of the law, which in this instance means knowledge of the licensing requirement. As the statutory language is clear, no resort to legislative history is necessary. Nonetheless, the overall legislative history illuminates the legislative intent that "willfulness" assumes violation of a known legal duty.

The original Act had no *mens rea* requirement. A declared purpose of the FOPA amendments was "to correct existing firearms statutes and enforcement policies." The 1982 Senate report stated that "willful violations" were "intentionally undertaken in violation of a known legal duty."

While FOPA had no House report, a House report critical of the FOPA bill acknowledged that under the willfulness standard the prosecution must prove that the defendant knew the requirements of the law. It advocated solely a "knowing" standard.

In the House, the clear choice was between H.R. 4332, the Judiciary Committee bill which had only the "knowing" standard, and the Volkmer substitute, the FOPA bill which also incorporated the willfulness standard. The

FOPA bill prevailed.

The Second Circuit's decision in this case is based on *United States v. Collins*, 957 F.2d 72, 76 (2d Cir. 1992). In holding that willfulness does not require knowledge of the law, *Collins* neither acknowledges that the statute also incorporates a "knowing" standard nor suggests how its construction of "willfulness" as "knowing and purposeful" would differ from "knowing."

Collins makes one mistake after another in its account of the legislative history. It asserts that there were no Senate reports and that the House Judiciary report was the report on FOPA. It claims that a secret "compromise" occurred in which FOPA's proponents acceded to the criticism of the House Judiciary report and of ATF. This is not borne out in the legislative record.

The Third, Fourth, Seventh, Eighth, Ninth, and Eleventh circuits have all construed FOPA's willfulness requirement to require knowledge of the law. *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988); *United States v. Hern*, 926 F.2d 764, 767 & n. 6 (8th Cir. 1991); *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994) *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995); *United States v. Hayden*, 64 F.3d 126, 129 (3rd Cir. 1995); and *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996). The Second Circuit stands alone.

Two of this Court's precedents on the meaning of willfulness in other statutes and the rules of construction set forth in those cases also mandate the interpretation that "willfulness" in FOPA means intent to violate the law. In *Cheek v. United States*, 498 U.S. 192, 201 (1991), this Court held that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known

legal duty.” Similarly, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), this Court cautioned against treating a willfulness requirement as surplusage, especially when it is an element of a criminal offense. *Ratzlaf* set forth three rules of construction: when the statutory text is clear, contrary interpretations of the legislative history must be disregarded; if “willfulness” is ambiguous, the rule of lenity requires that any doubt be resolved in favor of the defendant; and, while ignorance of the law is normally no excuse, Congress may decree otherwise by adopting a willfulness requirement. Applying these rules, this Court held that “willfulness” means knowledge of, and an intent to violate, the law. These rules of construction require the same meaning of willfulness in FOPA.

In sum, the Second Circuit’s view as expressed in *Collins* and followed here goes against the weight of six other circuits. It was decided without the benefit of this Court’s decisions in *Cheek* and *Ratzlaf*. It purports to be based on legislative history, but its account of that history is mistaken. Most of all, it fails to conduct the most elementary procedure of statutory construction when it interprets “willful” to mean “knowing,” and does not even mention that “knowing” is a separate statutory element for other crimes and thus must mean something different than “willful.” This Court should hold that “willfully” in the case at bar means violation of a known legal duty.

ARGUMENT

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY ESTABLISH THAT “WILLFUL” MEANS INTENTIONAL VIOLATION OF A KNOWN LEGAL DUTY

The Gun Control Act of 1968 (GCA), as amended by the Firearms Owners’ Protection Act of 1986 (FOPA), 18 U.S.C. § 924(a)(1), punishes whoever “knowingly” commits certain specified acts and whoever “willfully violates any other provision of this chapter” Included under the “willful” category is § 922(a)(1)(A), which makes it unlawful for any person, “except a . . . licensed dealer, to engage in the business of . . . dealing in firearms”²

The distinguishing statutory language is so clear that this analysis could end here. In a statute that makes “knowingly” an element of some offenses and “willfully” an element of others, the term “willfully” must mean something more than “knowingly.” The only additional element of *mens rea* by which “willfully” can be distinguished from “knowingly” is the element of knowledge of the law.

The “knowing” and “willful” standards were inserted by FOPA; the original GCA had no explicit intent standards. Yet it had never been the intent of Congress to discourage the ownership of and transactions in firearms by law-abiding citizens, and thus it was fitting that regulation of otherwise innocent behavior not impose criminal sanctions where no intent to violate the law existed. Accordingly, when enacting

² See § 921(a)(11) (“dealer”), (21) (“engaged in the business”), (22) (“with the principal objective of livelihood and profit”).

the FOPA reforms, Congress included the following statement of its legislative intent:

CONGRESSIONAL FINDINGS--The Congress finds that--

(1) the rights of citizens--

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment; --

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

§1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

As part of the statute, these Congressional findings should serve as a guide for interpretation of the statute's substantive provisions.³ The general language of these findings that are favorable to firearm ownership and transfers, and the specific explanation that the purpose of FOPA was "to correct existing firearms statutes and enforcement policies," suggest that reforms such as the "willfulness" standard were intended to have real meaning.

The specific language of the statute defining scienter and declaring the Congressional findings would normally suffice to resolve the issue here, and resort to the legislative history would be unnecessary.⁴ However, the legislative history here illuminates the reasons for and purpose of the statutory enactment. Additionally, the Second Circuit's analysis is based on a faulty version of the legislative history. Thus, the legislative background is analyzed below.

The first important version of the FOPA bill, S. 1030, would have made all offenses "willful," which was understood to mean the commission of an act with knowledge of its illegality.⁵ The 1982 Senate report

³ These express findings have been relied on in interpreting the provisions of the GCA as amended. *E.g.*, *United States v. Lopez*, 2 F.3d 1342, 1355 (5th Cir. 1993), *affirmed*, 115 S.Ct. 1624 (1995); *United States v. Marchant*, 55 F.3d 509, 515-16 (10th Cir. 1995); *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, C.J., dissenting from denial of petition for rehearing).

⁴ *Ratzlaf v. United States*, 540 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").

⁵ "Willful" has generally been defined to require action taken with the knowledge that it is illegal and with a malicious purpose." The Firearms Owner Protection Act: Hearings Before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st & 2nd Sess. on S. 1030, 102 (1982) (citing

explained the term as follows:

First, 103(a) inserts the word "willfully" into the general penalty clause contained in 18 U.S.C. 924(a). The purpose is to require that penalties be imposed only for willful violations--those intentionally undertaken in violation of a known legal duty. *United States v. Bishop*, 412 U.S. 346 (1973) and *Pomponio v. United States*, 429 U.S. 10 (1976). Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. . . . It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to "ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Senate Report 97-476, 97th Cong., 2d Sess., 22 (1982).⁶

cases) (statement of opponent). (Note that early versions of FOPA used the term "Owner" instead of "Owners'.")

⁶ Part of the impetus for enacting a willfulness standard was explained by the committee, *id.* at 15, by quoting from *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Senate Committee on the Judiciary, 97th Cong., 2d Sess., 20-21 (1982):

[I]t is apparent that the enforcement tactics made possible by

In 1984, the new version of the FOPA bill, S. 914, was changed to distinguish offenses as either "knowing" or "willful." The Senate Judiciary Committee report explained that the Administration had expressed concern that "requiring a 'willful' state of mind in some instances could pose legitimate law enforcement problems." S. Rep. No. 583, 98th Cong., 2d Sess., 20 (1985), citing *The Federal Firearms Owner Protection Act: Hearing before the Senate Committee on the Judiciary on S. 914, 98th Cong., 1st Sess., 22, 38 (1983)*. That reference included the Administration's analysis describing "Existing Law" (the Gun Control Act as passed in 1968) as follows: "Willfulness, i.e., knowledge of the requirements of law, not an element of proof for violation." It stated that the previous version of S. 914 "would require proof of 'willful' violations in any prosecution," and that the amended S. 914 "would require proof of 'willful' violation for certain prosecutions and proof of 'knowing' violations for

current firearms laws are constitutionally, legally, and practically reprehensible. . . .

The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge. . . . Since existing law permits a felony conviction upon these charges even where the individual has no criminal intent or knowledge, numerous collectors have been ruined by a felony record carrying a potential sentence of five years in a federal prison.

The Report of the Subcommittee on the Constitution described S. 1030 as "requir[ing] proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches." *Id.* at 23.

remainder of prosecutions."⁷ As is clear, the Administration interpreted the proposed willfulness requirement to make knowledge of the law an element of the offense.

Thus, explained the 1984 Senate report, "the Committee amendment specifies a 'knowing' state of mind with respect to offenses that involve the greatest moral turpitude and danger from a justified law enforcement standpoint." However, contrary to the 1982 report and to the Administration's analysis, the 1984 report then states that "the Committee intends 'willful' conduct to cover situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law." Report 98-583, at 20. This last statement appears to be a mistake given the detailed explanation in the previous Senate report and the redundancy that would be created. In any event, after describing the "knowing" offenses, the report adds:

The willful state of mind applies to all other offenses. These were determined to be generally more regulatory in nature, and warranted a higher state of mind to avoid the application of criminal penalties in inappropriate circumstances. These include purely record keeping offenses and others which, from a legitimate law enforcement standpoint,

⁷ On behalf of the Administration, Robert E. Powis, Deputy Assistant Secretary (Enforcement), Department of the Treasury, noted about willfulness that "in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act" by engaging in certain activities. The "knowing" standard "will ensure that law violators may be prosecuted without the additional unnecessary burden of proving that the defendant knew his acts violated the law." S. 914 Hearings, 48-49.

do not require less demanding state of mind requirements.

Id. at 21.

When taken up on the Senate floor in 1985, the FOPA bill was designated S. 49. Senator Hatch, floor manager of the bill, stated:

Those violations generally applicable to persons possessing specialized knowledge of gun laws would require a "knowing" commission of an illegal act. Those regulatory violations susceptible of unintentional commission are governed by the higher "willful" scienter to provide more protection against inadvertent violations.

131 Cong. Rec. S8690 (daily ed., June 24, 1985) (statement of Sen. Hatch). *And see id.* at S9125 (daily ed., July 9, 1985) (statement of Sen. Hatch).

Senate debate made clear enough that "willfulness" meant a specific intent to violate the law. See, e.g., *id.* at S9128 (statement of Senator Sasser, citing cases). A provision that "simple carelessness" was not an offense was dropped because even the weaker "knowing" element did not include carelessness. *Id.* at S9132 (statement of Senator Hatch). S. 49 passed the Senate overwhelmingly with no opposition to the "willful" provision. *Id.* at S9175, S9178.

No hearings on FOPA were held in the House, and no committee report on FOPA was issued by the House. The House Judiciary Committee opposed the bills that became FOPA, H.R. 945 and S. 49, and reported its own bill in opposition to FOPA, H.R. 4332. The House report

accompanying H.R. 4332 has been confused as a report on FOPA. House Judiciary Committee Report 99-495, 99th Cong., 2d Sess. (1986), reprinted in *1986 U.S. Code Cong. & Admin. News* at 1327.

The House report attacked the FOPA bills as follows:

It appears that the intent of the authors of the "willfulness" requirement of S. 49/H.R. 945 is that the prosecution have to prove that the defendant knew the details of the law, understood that his conduct would violate the law, and intentionally set out to violate the law. . . . Proponents of the willfulness standard argue that the offenses for which the standard would apply are mere regulatory offenses, for which a conscious and specific intent to violate the law should be required.

Id. at 11. Attacking that concept, the report insisted that a person who engaged in the business of selling arms "should not escape prosecution solely on the grounds that the government cannot produce witnesses to whom the defendant admitted knowledge that such conduct requires a federal license, and a determination to violate that law."⁸ *Id.*

The House report included ATF's criticism of the FOPA, in part because: "Willfulness may be interpreted to mean knowledge of the requirements of law and the specific intent to violate legal requirements." *Id.* at 19 (using as an example "a nonlicensee's illegal interstate firearms

⁸ The arms referred to in the report were hand grenades and machine guns. The report ignored that transfers of these items are subject to the stringent procedures of the National Firearms Act, which has no willfulness requirements. 26 U.S.C. § 5801 *et seq.*

purchases").⁹

The House Judiciary Committee bill, H.R. 4332, would have enacted a "knowing" standard only. The report explained:

Case law interpreting the criminal provisions of the Gun Control Act have [sic] required that the government prove that the defendant's conduct was knowing, but not that the defendant knew that his conduct was in violation of the law. It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results. This comports with the usual interpretations of the general intent requirements of current law.

H.Rep. No. 495, at 25-26.

H.R. 945, the bill that became FOPA, came to the House floor through a discharge petition. It was embodied in the Volkmer substitute to H.R. 4332, the Judiciary Committee bill, and both were debated simultaneously on the House floor.

Rep. Boehlert asserted that "the provisions relating to

⁹ In hearings preceding the House report, ATF counsel Jack Patterson testified that "I would define willfulness as that term is used in this bill to mean [not] only knowledge of the facts and the circumstances surrounding the violation, but knowledge of the requirements of the law as well." Noting the discrepancies in the two Senate reports, Mr. Patterson agreed with the 1982 report, explaining: "If knowledge is interpreted to mean knowledge of the facts, willfulness has got to be something higher" Legislation to Modify the 1968 Gun Control Act: Hearings Before the Committee on the Judiciary, U.S. House of Representatives, 99th Cong., 1st & 2nd Sess., 1201-02 (1987).

'willful intent' found in the Volkmer substitute are an integral part of our efforts to reform Federal firearms laws." 132 Cong. Rec. H1671 (daily ed., Apr. 9, 1986). However, the discussion was not consistent. Rep. McCollum quoted from Senate Report 98-583 the statement that willfulness included knowledge of all pertinent facts "but not necessarily knowledge of the law." He asked whether this was consistent with Volkmer's intent. Rep. Volkmer replied, "yes, it is identical to the Senate meaning." *Id.* at H1679.

Yet Rep. Hughes, just minutes later, stated that the willfulness requirement would "make it next to impossible to convict dealers, particularly those who engage in business without acquiring a license, because the prosecution would have to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law."¹⁰ *Id.* at H1684.

This was undoubtedly an exaggeration. One impetus for FOPA was the tendency of BATF agents to enter gun shows "undercover" and to arrest collectors who sold as few as three guns per year, charging them with engaging in the business without a license. *Id.* at H1652 (statement of Rep. Volkmer). A willfulness requirement in such circumstances would not be onerous. If a BATF agent believed that such a person should have a license, the agent could inform the person of the license requirement. Such notice would promote compliance with the law and, if the law was disobeyed, would serve as the basis of proof of knowledge of the law and a willful violation.

¹⁰ Rep. Hughes continued that "a dealer would practically have to sign a statement saying that, before committing the crime, he had studied the law, knew that what he had in mind was illegal, and did his damndest to make sure he violated the law." *Id.*

In the floor vote, the Judiciary-Hughes bill, H.R. 4332, was defeated, while the Volkmer substitute became FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Judiciary bill] was laid on the table."¹¹ *Id.* at H1753, H1757 (daily ed., Apr. 10, 1986).

The only exhaustive study of FOPA's legislative history found that "it is impossible to avoid the conclusion that Congress was fully aware that its use of 'willfully' in FOPA would require proof that the defendant actually knew of the illegality of his acts." D. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumberland Law Rev.* 585, 652 (1986-1987).

II. THE SECOND CIRCUIT'S ANALYSIS IS BASED ON A FAULTY ACCOUNT OF THE LEGISLATIVE HISTORY

According to the Second Circuit, "willful" essentially means nothing more than "knowing." This would render the term "willful" surplusage. The Second Circuit reaches this conclusion through a faulty analysis of FOPA's legislative history.

United States v. Bryan, 122 F.3d 90, 91 (2d Cir. 1997), which affirmed a conviction of engaging in the business of dealing in firearms without a license, held: "The willfulness element of unlawful sale of firearms does not

¹¹ This renaming of the Volkmer substitute as H.R. 4332, which was originally the bill in opposition to Volkmer, is probably why some courts and the *U.S. Code Cong. & Admin. News* mistakenly characterized the House Judiciary report as the report on the Firearms Owners' Protection Act.

require proof 'that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute.'" *Id.*, citing *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995). *Bryan* then noted that the Second Circuit reads the willfulness requirement to require "only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *Id.*, quoting *United States v. Collins*, 957 F.2d 72, 76 (2d Cir.), *cert. denied*, 504 U.S. 944 (1992).

Collins was the Second Circuit's original decision on point and was the basis for both *Bryan* and *Ali*. *Collins* held that one could be convicted of willfully dealing in firearms without a license without any proof that the defendant knew that a license was required. While deciding that it was error for the trial court not to instruct the jury that willfulness is an element of the offense, the error was harmless because the defendant understood that his sales violated the law. 957 F.2d at 74-77.

The discussion in *Collins* is marred by clear mistakes in its account of the legislative history. It characterizes the House report as "accompanying the 1986 Firearms Owners' Protection Act." *Id.* at 75. To the contrary, the House report opposed the FOPA bills (S. 49 and H.R. 945) and reported H.R. 4332, which had no willfulness standard and was defeated. *Collins* quotes the House report as criticizing the requirement of willfulness in the FOPA bills because that requirement would require proof that the defendant "knew the details of the law" and "intentionally set out to violate the law." *Id.* The *Collins* court proceeds to conclude that, because the House report criticized FOPA's willfulness requirement, the House nonetheless passed the FOPA bill

with its willfulness requirement but intended that the willfulness requirement "was meant to be read broadly to require only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *Id.* at 76. *Collins* gives three reasons for this conclusion, but the reasons do not survive careful scrutiny.

First, *Collins* quotes Senate floor statements that a purpose of FOPA was to redirect law enforcement away from inadvertent and innocent violations and toward violent crime. If anything, these comments demonstrate the intent not to allow a conviction if the person engaged in conduct without the specific intent to violate the law. *Collins* makes no attempt to reconcile its spin on these general comments with the fact that the statute distinguishes between "willful" and "knowing," and indeed *Collins* never even acknowledges that the statute has a "knowing" standard as well as a "willfulness" standard. *Collins* then inaccurately claims that "there was no Senate Report to accompany the bill," *id.* at 76, when in fact there was a 1982 Senate report which states that "willfulness" means violation of a known legal duty.

Second, *Collins* speculates that "a compromise on the willfulness provision can be inferred, since the House Report initially rejected its inclusion in the Act altogether." *Id.* at 76. Presumably FOPA's proponents acceded to the criticism of the House Judiciary leadership by changing the meaning of willfulness (albeit without disclosing that intent to anyone) rather than by deleting that term. This phantom "compromise" never occurred. The House bill championed by Rep. Hughes went down in flames while the FOPA bill managed by Rep. Volkmer won in an up-or-down vote. The choices were clear cut and the debate was tough. There was

no hidden compromise which watered down the meaning of willfulness.

Third, *Collins* notes that ATF had expressed concern that the willfulness requirement would make it difficult to prosecute some cases, adding: "The importance of the ATF's views is evidenced by the Judiciary Committee's decision to append the ATF's statement to the Committee Report." *Id.* at 76. Again, this was the committee report which was critical of the FOPA bill and which reported a bill, H.R. 4332, which the House rejected. Further, the very purpose of FOPA was to make it more difficult to prosecute cases and, indeed, to remove many activities from criminal sanction altogether. The Firearms Owners' Protection Act was intended to protect firearm owners from ATF abuses, not to make them worse. FOPA's preamble declared that "the rights of citizens" under the Constitution "require additional legislation to correct existing firearms statutes and enforcement policies,"¹² a clear rebuff to what was considered to be ATF's abusive enforcement of the Gun Control Act. How could *Collins* assume that the supporters of FOPA intended to ease the ATF's path to prosecutions, when FOPA was passed to "correct" ATF's policies?

Finally, *Collins'* interpretation of the willfulness requirement renders the term "willfully" mere surplusage. If the statutory term "willful" really means only "knowing," then what does the statutory term "knowing" mean? For all of these reasons, *Collins* misconstrues the law. *Bryan* merely follows this incorrectly-decided circuit precedent.

¹² §1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

III. ALL OTHER CIRCUITS TO RULE ON THIS ISSUE HAVE CORRECTLY DECIDED THAT WILLFULNESS REQUIRES KNOWLEDGE OF THE LAW, A CONCLUSION MANDATED BY THIS COURT'S DECISIONS IN *CHEEK* AND *RATZLAF*

A. Initial Post-FOPA Decisions

Not long after passage of FOPA, the circuits began to construe the meaning of "knowing" and "willful" as used in FOPA. In the evolution of this jurisprudence, all circuits, other than the Second, which have addressed the issue—the Third, Fourth, Seventh, Eighth, Ninth, and Eleventh—have concluded that willfulness means violation of a known legal duty.

Observing that the original GCA created strict liability offenses, the Ninth Circuit, in *United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988), decided that under FOPA "'knowingly' does not include knowledge of the law," but it does refer to the acts or omissions which must be known, and "an 'unknowing' act cannot constitute a violation." *Id.* at 1002. *Sherbondy* explained the legislative background as follows:

In drafting section 924(a), Congress chose the word "knowingly" precisely because it did not want knowledge of the law to be an element of the offenses. The earliest versions of FOPA required that all offenses be "willful." . . . The Treasury Department, along with various witnesses and members of Congress, objected that, with respect to certain serious offenses, including possession of guns

by felons, the government should not be required to prove intent to violate the law. . . . In response to this objection, Congress reduced the mens rea requirement for the most serious offenses from "willfully" to "knowingly."¹³

Id. (citations omitted).

In *United States v. Hern*, 926 F.2d 764, 767 & n. 6 (8th Cir. 1991), the Eighth Circuit noted that even the government did not dispute that "'willful' means an intentional violation of a known legal duty." *Id.* (citing House Judiciary Committee report and the term's use in other statutory contexts). Of course, "willfulness and intent need not be proven by direct evidence, but 'may also be proven by circumstantial evidence and frequently cannot be proven in any other way.'" *Id.* at 767 (citation omitted). *Hern* held that sufficient evidence existed in that case that the defendant willfully failed to record firearms transactions.¹⁴ *Id.*

B. This Court's Decisions in *Cheek* and *Ratzlaf* Mandate that "Willful" Be Interpreted to Mean Violation of a Known Legal Duty

This Court then decided two cases which apply

¹³ See *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (the knowing standard means "knowledge of the facts constituting the offense").

¹⁴ Given that FOPA's opponents constantly argued that it would be impossible to get convictions with the willfulness standard, it is ironic that *Hern*, the first case to be decided squarely on this issue, upheld the conviction.

directly to the issue presented here. These precedents define "willfulness" as violation of a known legal duty and explain why this interpretation is mandated.

The first of these, *Cheek v. United States*, 498 U.S. 192, 199-200 (1991), analyzed the background of the willfulness requirement in the tax laws as follows: "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption [that every man knows the law] by making specific intent to violate the law an element of certain federal crime tax offenses." Thus, held *Cheek*, "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" *Id.* at 201.

In terms of their ever-growing complexity, length, and technical characteristics, the same could be said for the Gun Control Act and its implementing regulations. FOPA's framers were well aware of this and sought to ameliorate it. Indeed, supporters of FOPA made statements similar to the following statement in *Cheek* upholding precedents which:

construed the willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law. This was because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law" and "[it] is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care."

Id. at 205 (citations omitted).

This Court's second, and more recent, case on point is *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994), which cautioned against treating a "'willfulness' requirement essentially as surplusage--as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." Where the "word 'willful' [is] used to describe certain offenses but not others in [the] same statute [it] 'cannot be regarded as mere surplusage; it means something.'" *Id.* (citation omitted).

Accordingly, *Ratzlaf* held that the willfulness requirement of 31 U.S.C. § 5322(a), which prohibits the structuring of bank deposits to avoid reporting requirements, meant the same as used elsewhere in the same subchapter: "both 'knowledge of the reporting requirement' and a 'specific intent to commit the crime,' i.e., 'a purpose to disobey the law.'" *Id.* at 141 (citation omitted).

This Court noted in *Ratzlaf*: "There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear." *Id.* at 147-48. Moreover, if the meaning of "willfulness" is ambiguous, the rule of lenity would apply, and "we would resolve any doubt in favor of the defendant." *Id.* at 148, citing, *inter alia*, *United States v. Bass*, 404 U.S. 336, 347-350 (1971), (applying the rule of lenity to a provision of the Gun Control Act), and *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

This Court explained in *Ratzlaf*: "We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. . . . In particular contexts, however, Congress may decree otherwise." 510 U.S. at 148. Finding that Congress did just that, this Court held that to convict *Ratzlaf*, "the jury had to find he knew the structuring in which he engaged was unlawful." *Id.*

C. Following *Ratzlaf*, all Other Circuits to Address the Issue Have Held FOPA'S "Willfulness" Requirement to Mean Violation of a Known Legal Duty

Following the guidance of this Court provided in *Ratzlaf*, all other circuits to address the meaning of "willfulness" in FOPA have held that term to mean the intentional violation of a known legal duty.

In an incisive analysis, the Seventh Circuit, in *United States v. Obiechie*, 38 F.3d 309, 310 (7th Cir. 1994), held about the licensing requirement at issue here that "knowledge of the law is an element of the government's proof under section 922(a)(1)(A)." The court appropriately rejected the reading of the legislative history set forth in *Collins*. *Id.* at 312. "The conflicting signals sent by FOPA's legislative history are of lesser importance, however, after the Supreme Court's recent decision in *Ratzlaf* . . ." *Id.* at 313. *Obiechie* continued: "Our duty under *Ratzlaf*, then, is to construe section 924(a)(1)(D)'s 'willfulness' requirement not by combing FOPA's legislative history for snippets of congressional intent, but by considering the context of the term's use within the overall structure of the statute." *Id.* at 313-14.

Obiechie notes that *Collins* failed to discuss

Sherbondy and *Hern*, was decided before this Court's decision in *Ratzlaf*, and "failed even to note that FOPA applies a 'knowingly' standard to some violations and a 'willfully' standard to others." *Id.* at 315. *Obiechie* held: "The only reasonable distinction between section 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law." *Id.*

Next came the Fourth Circuit, which in *United States v. Forbes*, 64 F.3d 928, 933 (4th Cir. 1995), decided that "'willfully,' especially in a statute in which Congress simultaneously uses 'knowingly,' connotes a more deliberate criminal purpose, sometimes to the point of requiring a specific intent to violate the law." *Id.*, citing *Ratzlaf*. *Forbes* noted that "Congress deliberately chose to impose the 'willful' and 'knowing' labels on different firearms offenses as a compromise between the positions of lobbyists for gun owners and of officials at the Treasury Department." *Id.* at 933 n. 6.

The Third Circuit, in *United States v. Hayden*, 64 F.3d 126, 129 (3d Cir. 1995), interpreting FOPA, held that "Congress intended 'willfully' to mean that a defendant must know his conduct is illegal." The *Hayden* court noted that the House report criticized the bill for precisely this reason. *Id.* at 130. "Perhaps more persuasive than the legislative history is the statutory context in which the 'willfully' language appears." The court explained:

In defining "knowingly," courts have almost uniformly rejected arguments that the term requires the defendant know his conduct was unlawful; rather, they have interpreted "knowingly" merely to require that the defendant know he was engaging in the

prohibited conduct. . . . In light of the legislative history, it is difficult to understand what more the "willfully" language could require, if not knowledge of the law.

Id.

Accordingly, *Hayden* held that "'willfully' in § 924(a)(1)(D) means the defendant must have acted with knowledge that his conduct was unlawful." *Id.* The court noted that this is hardly an impossible burden for the government. In a prosecution for false statements made on a firearm purchaser form, knowledge of the law may be proven by the fact that the form itself explains the law concerning who may not legally purchase a firearm. A purchaser's certification on the form that he does not fall within a prohibited class, absent mental incapacity or illiteracy, would be sufficient to prove knowledge of the law. *Id.* at 133.

Most recently, the Eleventh Circuit, in *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996), agreed with *Obiechie* that this Court's analysis in *Ratzlaf* applies to FOPA, and rejected *Collins*. Accordingly, *Sanchez-Corcino* held:

To prove a willful violation of § 922(a)(1)(A), the Government must prove that he (1) was required to have a license in order to deal in firearms, (2) knew that he did not have the requisite license, and (3) nonetheless voluntarily, intentionally engaged in the business of dealing in firearms, knowing that such conduct violated the licensing requirement.

Id. at 554.

The above body of jurisprudence is by no means unprecedented in the area of firearms licensing laws. The Arms Export Control Act, 22 U.S.C. § 2778(c), punishes persons who "willfully" violate the provisions of the Act, including the requirement that a license be obtained to export firearms. It is well settled that this provides "the element of specific intent, which requires the government to prove that the defendant voluntarily and intentionally violated a known legal duty." *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978). As applied to the unlicensed export of firearms, "the term 'willfully,' the *mens rea* element of § 2778, connotes a specific intent requirement." *United States v. Wilson*, 721 F.2d 967, 971 (4th Cir. 1983). Accord *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976). The above body of case law was well developed long before FOPA and would have been known by FOPA's authors.¹⁵

Lurking behind the government's position in this case is the policy argument that proving specific intent to violate the law makes prosecutions more difficult. Yet that result was the express intent of Congress in enacting FOPA. Congress sought to protect well-meaning and otherwise law-abiding citizens engaged in innocent activities from overzealous prosecutions based on a technical violation of

¹⁵ In *Obiechie*, the defendant had been prosecuted both under the Arms Export Control Act as well as the Gun Control Act. Ironically, the district court had recognized that "willfully" in the Arms Export Control Act meant violation of "a known legal duty to refrain from exporting firearms and ammunition without a license," but found that "willfully" in the Gun Control Act had no such meaning. 38 F.3d at 311. In *Obiechie*, the Seventh Circuit harmonized the two statutes.

law about which the citizen had no knowledge. The government cannot seriously contend that it has an unreasonable burden in pursuing warranted prosecutions in those circuits which interpret "willfulness" to mean violation of a known legal duty.

In sum, the Second Circuit's decisions in *Collins* and in this case are anomalous. The Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have held to the contrary, and their decisions are consistent with this Court's precedents in *Cheek* and *Ratzlaf*. For these reasons, this Court should hold that the term "willfully" as used in the Firearms Owners' Protection Act means violation of a known legal duty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court, U. S.

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CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997**

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF OF GUN OWNERS FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER SILLASSE BRYAN**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 96-8422

SILLASSE BRYAN, Petitioner

v.

UNITED STATES OF AMERICA

**BRIEF OF GUN OWNERS FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER SILLASSE BRYAN**

INTEREST OF THE AMICUS CURIAE

Gun Owners Foundation is an Internal Revenue Code Section 501(c)(3) organization incorporated under the laws of the Commonwealth of Virginia. Its purposes are to educate the public about the importance of the Second Amendment to the United States Constitution and to provide legal and other assistance for law-abiding individuals involved in firearms-related cases. GOF's more than 100,000 contributors are, by self-definition, strongly interested in the right to keep and bear arms and in opposing legislation and judicial interpretations which burden or impede that right.¹

1. The Foundation, for example, was *amicus curiae* in support of the decision by the Court last term to declare those portions of the Brady Act properly before it unconstitutional. *Printz v. United States*, 117 S.Ct. 2365 (1997). See 1996 WL 468617. Counsel of record

The right to keep and bear arms (and to inherit, own, collect, use and bequeath them) is, of course, largely meaningless without the ability to buy, sell, and trade firearms, and to transfer them to and from gunsmiths and artisans for repairs, modification or restoration.²

The proper interpretation of federal laws governing firearms licensing and regulation and their criminal enforcement are therefore of significant concern to gun owners and collectors. This is not least so in view of the well-documented history of constitutional rights abuses of gun owners by the federal agency principally responsible for enforcement of the federal firearms statutes, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms ("BATF").³ Importantly, BATF has a consistent

authored this brief in its entirety and no person or entity made any monetary contribution to the preparation or submission of the brief.

2. "The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. 165, 178, 8 Am.Rep. 8, 13 (1871).

3. See, e.g., Senate Committee on Appropriations, *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms*, 96th Cong., 1st Sess. (GPO; Washington, D.C.; 1979); *id.*, 96th Cong., 2d Sess. (GPO; Washington, D.C.; 1980); David T. Hardy, *The BATF's War on Civil Liberties: The Assault on Gun Owners* (Second Amendment Foundation; Bellevue, Wash.; 1979). See also, U.S. Department of the Treasury, *Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Wayne Howell* (GPO; Washington, D.C.; September 1993); Transcript of Joint Hearing of the Crime Subcommittee of the House Judiciary Committee and the National Security, International Affairs and Criminal Justice Subcommittee of the House Government Reform and Oversight Committee, *Review of the Siege of the Branch Davidians' Compound in Waco, Texas*, 104th Cong., 2d Sess. (Federal News Service; Washington, D.C.; July 19, 1995 - August 1, 1995); House Committee on the Judiciary and Committee on Government Reform and Oversight, *Materials Relating to the Investigation into the Activities of Federal*

history of abusing its authority under the statute regulating the purchase and sale of firearms which is at issue in this case.⁴

By letter dated January 12, 1998, the Solicitor General of the United States consented to the filing of this brief. By letter dated January 13, 1998, counsel for the petitioner consented to the filing of this brief.

STATEMENT OF THE CASE

The Foundation adopts the parties' Statements of the Case. We note that the decision of the Court of Appeals has now been reported at 122 F.3d 90.

ISSUE PRESENTED

The petitioner in this case has formulated the issue as follows:

1. Should this Court resolve a split of decisional authority at the Circuit Court of Appeals level on whether a conviction for violation of 18 USC 922 (a)(1)(A) requires proof that Petitioner was aware of the requirement for, but dispensed firearms

Law Enforcement Agencies toward the Branch Davidians, 104th Cong., 2d Sess. (GPO; Washington, D.C.; August 1996).

4. *Ibid.* The fact that the petitioner here is apparently not himself the subject of legal abuse is no more relevant to decision than the suggestion of the government that he is not a particularly appealing litigant. Brief for the United States re Certiorari, pp. 2, 5. Gideon, Miranda, Aguilar, Escobedo, Lopez, *et al.*, were also no angels; however, their causes were just. Our point is that repeated government abuse of a particular statute is an important reason for the Court to scrutinize that statute closely; the character of the abused is irrelevant.

without benefit of a federal firearm dealers license?

2. Did trial Judge [sic] err in charging jury that it need only find that Petitioner acted "knowingly" and not "willfully" in trafficking in firearms without a federal firearms license by declining to instruct the jury that it must find that Petitioner knew he required a Federal firearms license?

The government has restated the question presented as:

1. Whether a conviction under 18 U.S.C. 924(a)(1)(D) for willfully violating 18 U.S.C. 922(a)(1)(A), which prohibits dealing in firearms without a federal license, requires the jury to find that the offender knew of the federal licensing requirement and nonetheless sold firearms without a license.

The *Amicus* is mindful of the stricture of Rule 14.1(a) of the Court that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." With due deference to the parties and with no intended violence to Rule 14.1(a), the *Amicus* submits that a more precise formulation of the issue is:

Whether conviction for unlicensed dealing in firearms in violation of 18 U.S.C. § 922(a)(1)(A) requires proof beyond a reasonable doubt that the defendant knew of the federal licensing requirement and

consciously disregarded it, and that the jury be properly instructed on the requirement of proof of the defendant's specific knowledge.

The *Amicus* respectfully submits that the correct answer to this question is "Yes."

SUMMARY OF ARGUMENT

Even without evidence of congressional intent as to the requisite standard of *scienter* necessary to sustain a conviction for unlicensed firearms dealing under 18 U.S.C. § 922(a)(1)(A) the Court would be warranted by long-standing precedent in holding that specific knowledge of the legal requirement for a federal firearms license must be proved beyond a reasonable doubt.

Here, however, there can be little doubt of Congress' express intention to require specific knowledge of the statutory requirement for a firearms dealer license. This intention is found explicitly in the extensive legislative history of the statute and implicitly in a structural analysis of the statute itself.

The specific knowledge requirement is also supported by the better reasoned decisions of the courts of appeals.

ARGUMENT

I. Even without evidence of congressional intent as to the requisite standard of *scienter* necessary to sustain a conviction for unlicensed firearms dealing under 18 U.S.C. § 922(a)(1)(A) the Court would be warranted by long-standing precedent in holding that specific knowledge of the legal requirement for a federal firearms

license must be proved beyond a reasonable doubt.

Any discussion of *scienter* or willfulness in federal criminal law must begin with *Morissette v. United States*, 342 U.S. 246 (1952). There, Justice Jackson crafted a graceful exegesis of the law of criminal intent on behalf of an undivided Court.⁵ In that case, the Court stated (342 U.S. at 251):

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

The Court was unreceptive to the notion that Congress, in the absence of a clearly expressed intention, meant to omit a *mens rea* element from a criminal statute. *Id.* at 261-263. Rather, the Court concluded, there was a presumption that *mens rea* was a necessary element in any federal crime unless congressional intent to the contrary is found. *Id.* at 263. The Court also noted that the harshness of the penalty imposed by a statute was a consideration in whether Congress had intentionally omitted a *mens rea* element: "felony is ... as bad a word as you can give to man or thing." *Id.* at 260, quoting 2 Pollock and Maitland, *History of English Law* 465. The Court also addressed the

5. Justice Douglas concurred in the result without opinion and Justice Minton took no part in consideration or decision. 342 U.S. at 276.

frequent complaint of prosecutors that a strict requirement of willfulness makes prosecution too difficult:⁶

Of course, the purpose of every statute would be "obstructed" by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore the obstruction rationale does not help us....

Id. at 259. The Court ruled that a federal criminal statute forbidding conversion of government property required a showing that the defendant knew the property belonged to another (*i.e.*, was not abandoned) and intended to convert it to his own use.⁷ The Court had no occasion to address the knowledge of the law issue since it was dealing with a *malum in se* theft statute: "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation...." *Id.* at 260.

Five years later the Court had the opportunity to address the issue of a defendant's required knowledge of the law. In *Lambert v. California*, 355 U.S. 225 (1957), a

6. Government Brief re Certiorari, p. 14: "... proving specific knowledge of federal licensing requirements is quite difficult...." and "Application of Section 924(a)(1)(D) in such circumstances is hampered if the government must shoulder the burden of showing specific knowledge of the requirements of the United States Code as a prerequisite to conviction."

7. Justice Scalia has stated that *Morissette* "applied [the common-law rule of *scienter*] to a statute that ... contain[ed] the word 'knowingly,' in order to conclude that 'knowingly converts' requires knowledge not merely of the fact of one's dominion over property, but also knowledge of the fact that that assertion is a conversion, *i.e.*, is wrongful." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 80 (1994) (dissenting opinion).

prosecution under Los Angeles' felon registration ordinance, the Court stated the question as one of

whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

Id. at 227. Answering the question affirmatively, the Court ruled that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-230. Of interest here, the *Lambert* Court noted that "[m]any such [registration] laws are akin to licensing statutes in that they pertain to the regulation of business activities." *Id.* at 29. In large part, the statute of which Bryan has run afoul is a registration statute such as that in *Lambert*. The crime he is charged with here can only exist by virtue of his failure to "register" as a firearms dealer. In that sense his offense, like the one in *Lambert*, is a sin of omission rather than commission.

In 1985 the Court, in *Liparota v. United States*, 471 U.S. 419 (1985), again held that actual knowledge of the law was required to sustain a federal criminal charge. In a prosecution for unauthorized use of food stamps the Court held "that in a prosecution for violation of [7 U.S.C.] § 2024(b)(1), the Government must prove that the defendant knew that his acquisition of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433.

Again in *Cheek v. United States*, 498 U.S. 192 (1991), the Court held in a prosecution for willful failure to file income tax returns and willful evasion of taxes that

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

Id. at 201. It based this result in part on the fact that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 199-200. Anyone who has tried to make sense of the federal firearms statutes, regulations and forms can resonate to this reasoning.

Finally, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court again addressed the meaning of "willfulness" in a federal criminal statute (31 U.S.C. § 5322(a) -- the "anti-structuring" penalty provision), and held that the defendant in such a prosecution must be shown to have knowledge of the law which forbade his conduct. The Court held:

We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. [omitting citations] In particular contexts, however, Congress may decree otherwise. That, we hold, is what Congress has done with respect to 31 U.S.C. § 5322(a) and the provisions it controls. To convict Ratzlaf of the crime with which he was charged, violations of 31 U.S.C. §§ 5322(a) and 5324(3), the jury had to find he knew the structuring in which he engaged was unlawful.

Id. at 148. The Court reached this result by rejecting the government's argument that money laundering and transaction structuring to avoid reporting requirements were inherently suspect. "But currency structuring is not inevitably nefarious." *Id.* at 144. The Court has made the same point (in response to the same suggestions by the government) in *Staples v. United States*, 511 U.S. 600, 606-615 (1994). *Staples*, of course, rejected a strict liability interpretation of the National Firearms Act as it pertains to machineguns not visibly identifiable as such.

In summary, even in the absence of the explicit *mens rea* requirement found in 18 U.S.C. § 924(d)(1)(A), the Court would be fully warranted in construing it to require proof that the defendant had an evil intent because he knew his acts violated a known legal duty.

II. The requirement for proof of specific knowledge is to be found both in the extensive legislative history and in a structural analysis of the statute itself.

The Firearms Owners' Protection Act of 1986⁸ ("FOPA") is one of those rare congressional enactments whose title does not violate truth-in-advertising principles: It was, in fact, enacted to protect gun owners and enthusiasts from a documented history of abuse by the government in enforcing the Gun Control Act of 1968⁹ ("GCA").

When the GCA was enacted in 1968 its enforcement was entrusted to the Alcohol and Tobacco Tax Unit of the

8. Public Law No. 99-308, 100 Stat. 449-461 (99th Cong., 2d Sess.).

9. Presently chapter 44 of Title 18, United States Code, §§ 921-930.

Internal Revenue Service, a small office of a few hundred employees whose principal responsibilities theretofore had been regulation of the legal alcohol industry and the criminal repression of moonshining and bootlegging.¹⁰ With the expansion of its jurisdiction into firearms generally,¹¹ the unit grew -- first to a division within IRS and then, in 1972, into a full-blown bureau of the Treasury Department. Coincident with this increase in jurisdiction and staff (and bureaucratic stature) came a calamitous event, a tripling of the price of sugar, a mainstay of illegal alcohol distilling.¹² This had the result of doing what Prohibition could not: putting bootleggers out of business. The BATF found itself in the uncomfortable position of having too many agents and too few matters to occupy them. It solved this "problem" by turning its attention to the newly acquired jurisdiction over firearms. Through an over-zealous enforcement of the gun laws, including an over-expansive interpretation of "dealing in firearms" (coupled with questionable investigative tactics and widespread entrapment), it commenced criminal actions against numerous citizens who had no idea they were violating the new federal law licensing firearms dealers.¹³

10. David T. Hardy, *The BATF's War on Civil Liberties: The Assault on Gun Owners*, p. 7 (Second Amendment Foundation; Bellevue, Wash.; 1979).

11. The unit in 1968 already had jurisdiction over the National Firearms Act of 1934, 26 U.S.C. § 5801, *et seq.*, and the Federal Firearms Act of 1938, 15 U.S.C. §§ 901-910 (which was repealed by the GCA). However, enforcement of these statutes required only 214 agents prior to 1968. Hardy, note 10, *supra*, at 7.

12. Hardy, note 10, *supra*, at 7.

13. Hardy, note 10, *supra*, generally; Senate Oversight Hearings, note 3, *supra*; 132 Cong. Rec. H1649 - H1803 (April 9, 1986 (remarks of Congressman Volkmer)).

Congress was required to revisit the matter and did so. Beginning in 1979, it commenced hearings into BATF misconduct, which in one sense have never ended.¹⁴ These hearings and concerns led ultimately, through a tortured and lengthy legislative process to enactment of FOPA on May 19, 1986. Because the process was so lengthy, so partisan, and so controversial, it created a legislative history which is unusual, if not unique, in its completeness. Not only do we have the opposing House and Senate reports,¹⁵ but we have lengthy debates and discussions on

14. See the congressional hearings cited in note 3, *supra*. See also Transcript of Hearing of the Senate Judiciary Committee, *Federal Law Enforcement and the Good Ol' Boys Roundup* (Federal News Service; Washington, D.C.; July 21, 1995); *id.*, *Federal Raid at Waco* (Federal News Service; Washington, D.C.; October 31, November 1, 1995); Transcript of Hearing of the Terrorism, Technology, and Government Information Subcommittee of the Senate Judiciary Committee, *Federal Raid in Idaho (Ruby Ridge)* (Federal News Service; Washington, D.C.; September 6 - September 14, 1995); U.S. Department of Justice, *Report to the Attorney General on the Events at Waco, Texas, February 28 to April 19, 1993* (Washington, D.C.; October 8, 1993 (redacted version); U.S. Department of Justice, Office of Professional Responsibility, *Department of Justice Report Regarding Internal Investigation of Shootings at Ruby Ridge, Idaho, During Arrest of Randy Weaver* (undated; available on LEXIS Counsel Connect).

15. U.S. Senate, Committee on the Judiciary, Senate Report No. 97-476, *Federal Firearms Owners Protection Act: Report of the Committee on the Judiciary, United States Senate, to Accompany S. 1030, together with Supplemental, Additional, and Minority Views*, 97th Cong., 2d Sess. (GPO; Washington, D.C.; June 18, 1982); *id.*, Senate Report No. 98-583, *Federal Firearms Owners Protection Act: Report together with Additional and Supplemental Views*, 98th Cong., 2d Sess. (GPO; Washington, D.C.; August 8, 1984); U.S. House of Representatives, Judiciary Committee, House Report No. 99-495, *Firearms Owners' Protection Act*, 99th Cong., 2d Sess. (GPO; Washington, D.C.; March 14, 1986).

the floors of both Houses, including detailed statements by all the authors of the competing bills.¹⁶

We also have a comprehensive and near-contemporaneous analysis of the Act by one who was closely involved in the drafting, lobbying and negotiations which preceded its passage.¹⁷ Even casual readings of the legislative reports, the debates and the Hardy article compel the conclusion that the insertion of a willfulness standard into Section 924(d)(1)(A) of Title 18 was explicitly for the purpose of ensuring that the government had to prove certain defendants knew they were violating the Gun Control Act -- an actual knowledge/specific intent standard. The commentators agree:

In light of these extensive considerations, it is impossible to avoid the conclusion that Congress was fully aware that its use of "willfully" in FOPA would require proof that the defendant actually knew of the illegality of his acts.¹⁸

So did the principal opponent of FOPA, Representative Hughes of New Jersey:

Under the NRA bill [*i.e.*, the version which became law], a dealer would practically have

16. *E.g.*, 131 Cong. Rec. 16984 - 17003 (June 24, 1985) (Senate); 132 Cong. Rec. H1649 - H1803 (daily ed., April 9, 1986) (House).

17. David T. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumberland L.Rev.* 585 (1987).

18. *Id.* at 651-652. See also Stephen P. Halbrook, *Firearms Law Deskbook*, pp. 2-8 - 2-11 (Clark, Boardman, Callaghan; Deerfield, Ill.; 1995 and 1997 rev.).

to sign a statement saying that, before committing the crime, he had studied the law, knew what he had in mind was illegal, and did his damndest to make sure he violated the law.¹⁹

Even if the legislative history were not so clear, the structure of Section 924 compels a similar conclusion. Congress was specifically rejecting a strict liability standard previously held by a number of courts to have been the original standard of GCA offenses.²⁰ It did this by amending the penalty provision to provide for a "knowing" standard in the case of the more serious offenses, and a "willful" standard in the case of the less serious, more technical offenses. If "willful" means no more than that the defendant must have been physically conscious of his act or omission without regard to whether he knew it was forbidden by law, then how does it differ from "knowing"? Such an interpretation reads "willful" right out of the law and the courts traditionally will not adopt an interpretation of a statute which renders part of it surplusage, or worse, meaningless.²¹

Thus, even in the absence of any legislative guidance the structure of Section 924(d)(1)(A) would

19. 132 *Cong. Rec.* H1684 (April 9, 1986). In spite of this overwrought hyperbole, it appears that the government could easily have met this burden in this case: "Petitioner admitted to one of his accomplices that he could not buy guns ... because he did not have a license." Trial Tr. 30. Of course, Congressman Hughes' fears could also be allayed by abrogation of the Fourth, Fifth and Sixth Amendments or abolition of the suppression of evidence doctrine.

20. E.g., *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988); *United States v. Carmany*, 901 F.2d 76 (7th Cir. 1990).

21. See the cases and discussion in Part III, *infra*.

compel the conclusion that a violation of Section 922(a)(1)(A) requires proof the defendant knew of the statutory requirement for a license. A defendant who buys or sells a firearm can never do so unwittingly or inadvertently or unconsciously. He will always "know" he is doing so. But to act "willfully," he logically must also know that he should not engage in the transaction. And because the bare act of buying or selling a firearm is neither immoral, illegal nor fattening, he must know that he should not do it because there is a law which specifically forbids it.²²

The purchase, possession, use and sale of firearms are intrinsically neutral acts. Standing alone they have no sinister or evil aspect or moral content; indeed, they enjoy a constitutionally protected status.²³ There are more than 223 million firearms in private hands in the United States²⁴ -- approximately one for every adult citizen. Indeed, this Court has noted that "there is a long tradition of widespread lawful gun ownership by private individuals in this country,"²⁵ and "despite their potential for harm, guns generally can be owned in perfect innocence."²⁶ Every weekend at thousands of gun shows, swap meets, flea

22. "Specifically," because knowledge that, for example, the purchaser is a felon or an addict is evidence of a different offense, but not of unlawful dealing. See *United States v. Sanchez-Corcino*, 85 F.3d 549 at 554, n. 3 (11th Cir. 1996).

23. U.S. Constitution, Amend. II. See Justice Thomas's concurring opinion in *United States v. Printz*, 117 S.Ct. 2365 (1997).

24. U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Selected Findings*, NCJ-14820, p. 1 (July 1995); *Staples v. United States*, 511 U.S. 600, 613-614, n. 8 (1994).

25. *Staples*, note 24, *supra*, 511 U.S. at 610.

26. *Id.* at 611.

markets, county fairs and other expositions around the country American citizens buy, sell and trade firearms in private transactions which do not require a federal firearms license ("FFL"). It is counterintuitive to suggest that they are, collectively or individually, aware of the requirement for an FFL should their occasional transactions rise to a level which the BATF might consider "engaging in the business."²⁷

As the historical record demonstrates, BATF has considered almost any level of activity to constitute "engaging in the business," with tragic consequences for innocent citizens. It is these consequences Congress sought to end by imposing a higher burden of proof on the government through the FOPA amendments.

III. The requirement for specific knowledge is supported by the better reasoned decisions of the courts of appeals.

The court of appeals here was bound to follow -- albeit with no discernible enthusiasm -- the law of the Second Circuit as enunciated by an earlier panel. That earlier decision, *United States v. Collins*, 957 F.2d 72 (2d Cir. 1992), cert. denied, 504 U.S. 944 (1992), involved an unlicensed dealing situation similar to the one here and held it was harmless error for the district court to fail to charge the jury that the crime of unlicensed dealing in firearms must be willful.

27. See *Staples*, *id.* at 614 and n. 9. Indeed, given the arcane and complicated definitions of the GCA governing dealing in firearms, it may be counterintuitive to suggest that even a lawyer would understand the ramifications. See 18 U.S.C. §§ 921(a)(10), (11)(A) - (C), (12), (13), (21)(A) - (F), and (22).

Three courts of appeals have now had an opportunity to decide exactly the same issue in light of *Collins* and each has correctly rejected *Collins*.²⁸

Collins involved a rather extraordinary situation where, six years after passage of FOPA, the government managed to get all the way through investigation, indictment, trial, verdict and appeal before discovering there was a tiny little technical requirement of "willfulness" embedded in the statute it was seeking to enforce. 957 F.2d 72 at 74. The defense was apparently equally ignorant of the law in failing to request a willfulness instruction, as was the trial court in failing to give one.

Striving mightily to sustain the result of this comedy of errors the court of appeals managed only to further confuse the situation. In a passage which defies understanding the court held that the district court's failure to instruct on willfulness somehow "presumed" willfulness to exist: "Here, the district court, through its failure to charge [willfulness], presumed that willfulness existed." *Id.* at 75. To the contrary, there is no evidence that anyone connected with the trial gave any thought to the mental element of the offense.

The court then engaged in an analysis of willfulness that renders it no different from "knowing" -- thereby failing to grasp that the statute under examination used these two different standards to punish two different sets of offenses. Since *Collins* raised an entrapment defense, which conceded the commission of the physical acts charged, he thereby admitted he had knowledge of his acts

28. *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994); *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995); and *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996).

and the jury thus had proof of "willfulness." Therefore, according to the court, it was harmless error, beyond a reasonable doubt, that the word "willful" never crossed anyone's lips at trial.

Collins has rightly (and unanimously) been criticized by the three circuits which have rejected it. In *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994), the court, after holding that "willfully" as used in Section 924(d)(1)(A) required proof of "an intentional violation of a known legal duty," stated:

In reaching the opposite conclusion in *Collins*, the Second Circuit neither discussed [*United States v.*] *Sherbondy* [865 F.2d 996 (9th Cir. 1988)] and [*United States v.*] *Hern* [926 F.2d 764 (8th Cir. 1991)], nor attempted to differentiate between FOPA's "knowingly" and "willfully" standards. See 957 F.2d at 74-76. Indeed, *Collins* failed even to note that FOPA applies a "knowingly" standard to others. Thus, we are not persuaded by the Second Circuit's analysis....

38 F.3d 309 at 315.

In *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995), the court stated, "Although we recognize the Court of Appeals for the Second Circuit reached a contrary result in *United States v. Collins*, ... we concur with the discussion of *Collins* in *United States v. Obiechie*...." 64 F.3d 126 at 130, n. 6. The court stated that "in light of the legislative history, it is difficult to understand what more the 'willfully' language could require, if not knowledge of

the law," *ibid.*, and went on to reverse and remand for failure to give the required specific intent instruction.

In *United States v. Sanchez-Corcino*, 85 F.3d 549, at 553, n. 1 (11th Cir. 1996), the court stated:

In agreeing with the Seventh Circuit [in *Obiechie*], we necessarily disagree with the Second Circuit's contrary interpretation of Section 924(a)(1)(D) in *Collins*. In *Collins*, the Second Circuit, without noting the "willfully" requirement's statutory context, looked straight to the statute's legislative history to guide its interpretation. Based upon its reading of the legislative history, the Second Circuit concluded that the willfulness requirement did not contemplate knowledge of the law, but required the Government to prove only that "the defendant intended to commit an act which the law forbids." *Collins*, 957 F.2d at 76. This analysis ignores the effect of Congress's use of "knowingly" in the adjacent subsections of the statute on the meaning of "willfully" in 924(a)(1)(D), a point that, as did the *Obiechie* court, we think is critical to a proper interpretation.

Each of the three circuits held that "willfully" as used in 18 U.S.C. § 924(a)(1)(D) requires the government in a prosecution for unlicensed firearms dealing to prove that the defendant intentionally violated a known legal duty, *i.e.*, that he knew an FFL was needed to deal in firearms, lacked such a license, and nevertheless engaged in dealing. See also *United States v. Hern*, 926 F.2d 764 (8th Cir. 1991) (where the government conceded that FOPA's use of

the term "willfully" meant the "intentional violation of a known legal duty"); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995) ("On the other hand, 'willfully,' especially in a statute in which Congress simultaneously uses 'knowingly,' connotes a more deliberate criminal purpose, sometimes to the point of requiring a specific intent to violate the law"); and *United States v. Otiaba*, 862 F.Supp. 251 (N.D. 1994) (where the court rejected *Collins* both because the legislative history it cited was contrary to its conclusion and its ruling was ambiguous).

CONCLUSION

The Court should determine that the term "willfully" as used in 18 U.S.C. § 924(a)(1)(D) requires proof beyond a reasonable doubt that the defendant in a prosecution for unlicensed dealing in firearms under 18 U.S.C. § 922(a)(1)(A) knew he was required to have a federal license and consciously disregarded that duty. The decision below should be reversed.

Respectfully submitted,

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